(44)

No. 01-1118-CFX Title: Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and The Pro-Life Action League, Inc., Petitioners
v.
National Organization for Women, Inc., et al.

Docketed:
January 31, 2002 Court: United States Court of Appeals for the Seventh Circuit

Vide:
01-1119

Entry	Date	Proceedings and Orders
	Jan 28 2002	Petition for writ of certiorari filed. (Response due March 2, 2002)
	Feb 20 2002	Brief of respondent Operation Rescue in support of petition filed.
	Mar 4 2002	Motion of People for the Ethical Treatment of Animals, Inc. for leave to file a brief as amicus curiae filed.
	Mar 4 2002	Brief amicus curiae of Alabama filed. VIDED.
	Mar 4 2002	Brief of respondents National Organization for Women, Inc., et al. in opposition filed. VIDED.
	Mar 4 2002	Brief amici curiae of Catholic Conference of Illinois, et al. filed. VIDED.
	Mar 4 2002	Brief amicus curiae of Concerned Women for America filed. VIDED.
	Mar 4 2002	Motion of Seamless Garment Network, et al. for leave to file a brief as amici curiae filed.
	Mar 4 2002	Motion of Life Legal Defense Foundation for leave to file a brief as amicus curiae filed.
	Mar 8 2002	Opposition of respondents to motion of People for the Ethical Treatment of Animals, Inc. for leave to file a brief as amicus curiae filed.
	Mar 12 2002	Opposition of respondents to motion of Seamless Garment Network, et al. for leave to file a brief as amici curiae filed.
	Mar 13 2002	Opposition of respondents to motion of Life Legal Defense Foundation for leave to file a brief as amicus curiae filed.
	Mar 19 2002	Reply brief of petitioners Joseph Scheidler, et al. filed.
	Mar 19 2002	LODGING consisting of ten copies of related material submitted by counsel for amicus Life Legal Defense Fdtn.
	Mar 20 2002	DISTRIBUTED for Conference of April 12, 2002
	Apr 15 2002	REDISTRIBUTED for Conference of April 19, 2002
	Apr 22 2002	Motion of People for the Ethical Treatment of Animals, Inc. for leave to file a brief as amicus curiae GRANTED.
	Apr 22 2002	Motion of Seamless Garment Network, et al. for leave to file a brief as amici curiae GRANTED.
	Apr 22 2002	Motion of Life Legal Defense Foundation for leave to file a brief as amicus curiae GRANTED.
	Apr 22 2002	Petition GRANTED. limited to Questions 1 and 2 presented by the petition in No. 01-1118. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT December 4, 2002. **********

3pp

Entry	Date	Proceedings and Orders
	May 3 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including July 2, 2002.
	May 8 2002	Consent to the filing of amicus briefs in support of either party or of neither party received from counsel for the petitioners.
	May 9 2002	Consent to the filing of amicus briefs in support of either party or of neither party receoved from counsel for the respondents.
	May 21 2002	Brief amicus curiae of Texas Black Americans for Life and L.E.A,R.N. filed. VIDED.
	Jun 13 2002	Order further extending time to file the joint appendix and petitioners' briefs on the merits to and including July 12, 2002.
	Jun 19 2002	Motion of Alan Ernest to represent children unborn and born alive filed.
	Jul 2 2002	Brief amicus curiae of Catholics for Life, Sacramento filed. VIDED.
	Jul 8 2002	Joint appendix filed. VIDED.
	Jul 11 2002	Brief amicus curiae of Liberty Counsel filed. VIDED.
	Jul 12 2002	Brief of petitioners Joseph Scheidler, et al. filed. VIDED.
	Jul 12 2002	Brief of petitioner Operation Rescue filed. VIDED.
	Jul 12 2002	Brief amicus curiae of People for the Ethical Treatment of Animals, Inc. filed.
	Jul 12 2002	Brief amici curiae of Alabama, et al. filed. VIDED.
	Jul 12 2002	Brief amici curiae of Seamless Garment Network, et al. filed. VIDED.
	Jul 12 2002	Brief amicus curiae of Concerned Women for America filed. VIDED.
	Jul 12 2002	Brief amicus curiae of Americans United for Life filed. VIDED.
	Jul 12 2002	Brief amicus curiae of Center for Individual Rights filed. VIDED.
	Jul 12 2002	Brief amicus curiae of National Right to Work Legal Defense Foundation filed. VIDED.
	Jul 12 2002	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
	Jul 12 2002	Brief amicus curiae of New York Council of Defense Lawyers filed. VIDED.
	Jul 12 2002	Brief amicus curiae of Rutherford Institute filed. VIDED.
	Jul 12 2002	Brief amicus curiae of United States filed. VIDED.
	Jul 12 2002	Brief amicus curiae of Life Legal Defense Foundation filed. VIDED.
	Jul 24 2002	Order extending time to file respondents' brief on the merits to and including September 16, 2002.
	Aug 8 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 26 2002	Motion of Alan Ernest to represent children unborn and born alive DENIED.
	Sep 5 2002	Order further extending time to file respondents'

No. 01-1118-CFX

Entry	Date	Proceedings and Orders
		briefon the merits to and including September 17, 2002.
	Sep 12 2002	Record filed.
	Sep 12 2002	Brief amicus curiae of Emily Lyons filed. VIDED.
	Sep 13 2002	Brief amici curiae of NARAL Foundation, et al. filed. VIDED.
	Sep 16 2002	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.
	Sep 17 2002	Brief amicus curiae of Motorola Credit Corporation filed. VIDED.
	Sep 17 2002	Brief amici curiae of California, et al. filed. VIDED.
	Sep 17 2002	Brief amici curiae of Feminist Majority Foundation, et al. filed. VIDED.
	Sep 17 2002	Brief amici curiae of American Medical Association, et al. filed. VIDED.
	Sep 17 2002	Brief amici curiae of Religious Coalition for Reproductive Choice, et al. filed. VIDED.
	Sep 17 2002	Brief of respondents National Organization for Women, Inc., et al. filed. VIDED.
	Sep 17 2002	Brief amici curiae of Former Federal Prosecutors, et al. filed. VIDED.
	Oct 7 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 18 2002	Reply brief of petitioners Joseph Scheidler, et al. filed. VIDED.
	Oct 18 2002	Reply brief of petitioner Operation Rescue filed. VIDED.
	Oct 28 2002	Record filed.
	Nov 1 2002	CIRCULATED.
	Dec 4 2002	ARGUED.

Supreme Court, U.S.
FILED

011118 JAN 28 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

205 pp

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" – and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)) – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

3. Whether, in this civil RICO action based on the nationwide conduct of thousands of abortion protesters over a 15-year period, the jury's determination of liability and award of treble damages – and the procedures and instructions used by the trial court to channel the jury's decisionmaking – satisfied the exacting standards for the protection of First Amendment rights mandated by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

RULE 14.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW) is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed. Operation Rescue, a defendant below, is filing a separate petition for a writ of certiorari.

Petitioner Pro-Life Action League, Inc. has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. This Court Should Resolve The Conflicts Over Whether Injunctive Relief Is Available In A Private RICO Action 6

A. The Conflict in the Circuits 7

B. The Issue Is Important and Recurring 10

C. The Decision Below Is Wrong 10

II. This Court Should Resolve The Conflicts Over The Meaning Of Extortion Under The Hobbs Act 14

A. The Conflict in the Lower Courts 16

B. The Issue Is Important and Recurring 20

TABLE OF CONTENTS—Continued

Page(s)

C. The Decision Below Is Wrong 22

III. The Court Should Review The Seventh Circuit's Holding That The Jury's Imposition Of Liability And Treble Damages Under RICO Satisfied The Exacting Standards Of *NAACP* v. *Claiborne Hardware Co.* .. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs.*, 483 U.S. 143 (1987) 11

Alexander v. *United States*, 509 U.S. 544 (1993) 24

Beck v. *Prupis*, 529 U.S. 494 (2000) 27

Bennett v. *Berg*, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983) 9

Bolin v. *Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000) 8

Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984) 26, 30

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 20

Cedric Kushner Promotions, Ltd. v. *King*, 121 S. Ct. 2087 (2001) 11

Dan River, Inc. v. *Icahn*, 701 F.2d 278 (4th Cir. 1983) 8

Evans v. *United States*, 504 U.S. 255 (1992) 17, 20, 23

Feminist Women's Health Ctr. v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995) 21

FTC v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S.411 (1990) 24

TABLE OF AUTHORITIES—Continued

Page(s)

G.I. Holdings, Inc. v. *Baron & Budd*, 2001WL 1598340 (S.D.N.Y. Dec. 1, 2001) 18

Holmes v. *SIPC*, 503 U.S. 258 (1992) 11, 12

Imagineering, Inc. v. *Kiewit Pac. Co.*, 976 F.2d 1303 (9th Cir. 1999) 10

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 9, 13

Kaushal v. *State Bank of India*, 556 F. Supp. 576 (N.D. Ill 1983) 13

Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) 18, 21

Lincoln House, Inc. v. *Dupre*, 903 F.2d 845 (1st Cir. 1990) 9

McNally v. *United States*, 483 U.S. 350 (1987) 20, 24

Minnesota v. *Northern Sec. Co.*, 194 U.S. 48 (1904) 12, 14

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) ..... *passim*

Nakash v. *Superior Court*, 241 Cal. Rptr. 578 (Cal. App. 1987) 10

New York v. *Operation Rescue Nat'l*, 273 F.3d 184 (2d Cir. 2001) 30

NOW v. *Scheidler*, 510 U.S. 249 (1994) 1, 3, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Oregon Laborers-Employers Health & Welfare Trust Fund v. *Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999) 10

Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) 12

Palmetto State Med. Ctr., Inc. v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) 21

Religious Technology Ctr. v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). ..... *passim*

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 11

Richardson v. *United States*, 526 U.S. 813 (1999) 27

Rotella v. *Wood*, 528 U.S. 549 (2000) 11

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 12, 27

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 13

Tafflin v. *Levitt*, 493 U.S. 455 (1990) 10

Town of West Hartford v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) 18, 19, 20

Trane Co. v. *O'Connor Sec.*, 718 F.2d 26 (2d Cir. 1983) 8

United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 28

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000) 16

United States v. *Bass*, 404 U.S. 336 (1971) 24

United States v. *Enmons*, 410 U.S. 396 (1973) ... 19, 20, 23

United States v. *Green*, 350 U.S. 415 (1956) 17

United States v. *Nedley*, 255 F.2d 350 (3d. Cir. 1958) 16

United States v. *Panaro*, 266 F.3d 939 (9th Cir. 2001) 16, 17

Wheeling-Pittsburgh Steel Corp. v. *Mitsui & Co.*, 221 F.3d 924 (6th Cir. 2000) 8

Statutes:

15 U.S.C. § 1 2

15 U.S.C. § 15(a) 8, 12

15 U.S.C. § 26 ..... 8, 12

18 U.S.C. § 1341 20

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1961 ..... 1, 5

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 1962(c) 3, 4

18 U.S.C. § 1963(a) 24

18 U.S.C. § 1964(c) ..... *passim*

42 U.S.C. § 11046(a)(1) 13

N.Y. PENAL LAW § 155.05.2(e) (McKinney 2001) 23

N.Y. PENAL LAW § 135.60 (McKinney 2001) 23

Miscellaneous:

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000) 22

BLACK'S LAW DICTIONARY (5th ed. 1979) 22

Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988) 20, 22

Bradley, NOW v. Scheidler: *RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129 ..... 21, 23

Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) 21, 24

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 267 F.3d 687. The order denying rehearing (App., *infra*, 142a-143a) is unreported. The district court's opinion disposing of the motion to dismiss the third amended complaint (App., *infra*, 32a-108a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (App., *infra*, 109a-141a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2001, and rehearing was denied on October 29 (App., *infra*, 1a, 142a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, are set forth at App., *infra*, 152a-153a.

STATEMENT

This important case, involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics, returns to this Court after eight years of proceedings in the lower courts. Following this Court's reversal of the dismissal of respondents' complaint, 510 U.S. 249 (1994), the case was remanded and, in the spring of 1998, tried before a jury over seven weeks. As the case now returns to this Court, the jury has found petitioners civilly liable as racketeers for various (but unidentified) acts of "extortion" – defined by the jury instructions in exceedingly broad terms – occurring over more than a decade and involving the acts of unidentified protesters. The district court entered a final judgment against petitioners, including an award of treble damages and a nationwide injunction, and the Seventh Circuit affirmed.

In its current posture, this case squarely presents three issues of surpassing importance on which the lower courts are in disarray. To resolve those conflicts, review should be granted.

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL) is a nonprofit Illinois corporation. Respondents the National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against petitioners and various other individuals and entities.[1] In their amended complaint, respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by the unlawful activities of petitioners (represented by NOW). NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged violations of the Sherman Act (15 U.S.C. § 1), RICO, and state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of

[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. Operation Rescue, which was a party to the judgment in the district court and to the appeal in the Seventh Circuit, is filing a separate petition for a writ of certiorari (hereafter cited as "OR Pet.").

"racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Specifically, respondents accused petitioners of having "wrongful[ly] use[d] * * * actual or threatened force, violence, or fear," *id.* § 1951(b)(2), to "obtain[]" their "property," by inducing doctors and clinic employees to leave their jobs and by discouraging and obstructing patients from obtaining abortions. Respondents also alleged a conspiracy under 18 U.S.C. § 1962(d). They requested treble damages, costs, attorney's fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the dismissal of the antitrust claims, the Seventh Circuit reasoned that the Sherman Act "was not intended to reach the activities of organizations espousing social causes." *Id.* at 618. The Seventh Circuit upheld the dismissal of the claims under Sections 1962(c) and 1962(d) on the ground that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629.[2]

This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, holding that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose, 510 U.S. 249, 256 (1994). Despite considerable debate in the briefs and at oral argument over whether petitioners wrongfully "obtained" any "property" in violation of the Hobbs Act, see, *e.g.*, No. 92-780 Br. for Resp. Randall Terry *et al.*, 1993 WL 459719, at *28-45; No. 92-780 Oral Arg. Tr., 1993 WL 757635, at *14-15, *21-24, *25-32 (Dec. 8, 1993), this Court did not reach that issue. 510 U.S. at 253 n.2, 262. In a concurring opinion, Justice Souter, joined by Justice Kennedy,

[2] On other grounds, the Seventh Circuit upheld the dismissal of respondents' separate RICO claims under 18 U.S.C. § 1962(a), see 968 F.2d at 623-24, which were based on the theory that voluntary donations made to petitioners by their political supporters was "income derived, directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 941.

noted the risk that "a RICO action against a protest group" could "deter protected advocacy" and "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Id.* at 265.

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, respondents (now lacking antitrust claims) requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims under Sections 1962(c) and Section 1962(d) against petitioners. App., *infra*, 107a. It also rejected the argument that petitioners could not be found liable for extortion under the Hobbs Act because, among other things, they had not "obtained" any "property" of respondents. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. §1964(c). App., *infra*, 87a-90a.

Several years later, after the district court formally certified the two classes described above (172 F.R.D. 351, 363 (1997)), certain defendants – not including petitioners – moved for summary judgment. The court granted the motion in part, observing that this lawsuit was "paradigmatic of RICO's seemingly unlimited applicability." 1997 WL 610782, at *1 (N.D. Ill. 1997). Among other things, the district court held that respondents had failed to raise any triable issue of fact on certain of their more inflammatory claims, including alleged predicate acts of murder, kidnapping, and arson. *Id.* at *18-19.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of abortion protesters over a 15-year period. App., *infra*, 4a ("hundreds of acts"). The jury returned a verdict for respondents on their claim under Section 1962(c) and, consistent with the instructions, did not reach the RICO conspiracy claim. Based on the instructions, the jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation

of the Hobbs Act, 18 U.S.C. § 1951.[3] Because the judge had rejected petitioners' request that the jury be required to specify the predicate acts it found (Tr. 4495-98), the verdict form did not identify the racketeering acts that were the basis for liability. Based on evidence presented by respondents of certain increased security costs, the jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled.

From June 30 to July 2, 1998, the district court conducted a hearing on respondents' request for injunctive relief. On July 28, 1999, the court denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 109a-141a. The court reiterated its view that injunctive relief was available to private parties under RICO. *Id.* at 131a-132a.

4. The Seventh Circuit affirmed. App., *infra*, 1a-31a. Three aspects of that decision are of particular relevance here. *First*, the court held that injunctive relief is available to a private litigant suing under RICO. *Id.* at 6a-14a. In reaching that conclusion, the Seventh Circuit openly disagreed with the Ninth Circuit. *Second*, the court rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics or their customers, much less done so with their "consent." *Id.* at 28a-29a. Relying on Seventh Circuit precedent, the court ruled that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss

---

[3] The jury also found 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion), which qualify as predicate acts under RICO, see 18 U.S.C. § 1961(1)(A); 25 acts of conspiracy to violate federal or state extortion law; 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951; 23 violations of the Travel Act, which proscribes travel across state lines or use of the mails or telephone, with the intent to commit extortion under the Hobbs Act or state law, see 18 U.S.C. §§ 1952(b), 1961(1)(A); and 23 attempts to violate the Travel Act. The relevant jury instructions, as well as the special verdict form, are reprinted at App., *infra*, 146a-163a.

to, or interference with the rights of, the victim is all that is required." *Id.* at 29a (internal quotations omitted). *Third*, the Seventh Circuit rejected petitioners' argument that the jury's imposition of liability and treble-damages award, and the procedures and jury instructions used to ensure that the judgment was not based on petitioners' constitutionally protected exercise of their rights of free association and speech, failed to adhere to the stringent requirements mandated by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). App., *infra*, 14a-22a.

REASONS FOR GRANTING THE PETITION

This case involves the application of both the Hobbs Act, which severely punishes acts of robbery and extortion affecting interstate commerce, and the federal racketeering laws, to social and political protesters whose demonstrations, sit-ins, and speech interfered with the operation of clinics. As this case returns to the Court, it squarely presents three issues that satisfy the traditional criteria for this Court's review – because they are important, recurring, and have divided the lower courts. It presents the question whether injunctive relief is available in a private civil action for treble-damages brought under RICO. It raises important questions concerning the scope of the crime of extortion under the Hobbs Act. And finally, it presents the question whether the liability judgment and damages award in this sprawling RICO case – and the procedures used to channel the jury's decisionmaking – comported with the First Amendment.

I. This Court Should Resolve The Conflict Over Whether Injunctive Relief Is Available In A Private RICO Action

In holding that RICO authorizes private plaintiffs who are suing for treble damages to seek injunctive relief as well, the Seventh Circuit expressly disagreed with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). In so doing, the Seventh Circuit became the first federal appellate court to uphold the availability of injunctive relief in this setting. Although the panel (like the district court) attempted to mask the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta*

and are split" (App., *infra*, 6a; see also *id.* at 88a-90a, 131a-132a), in fact every other circuit that has discussed the issue has agreed with the Ninth Circuit. To bring the Seventh Circuit into line with the other circuits and with the vast majority of district courts to address the issue, review should be granted.

A. *The Conflict in the Circuits.* 1. In *Wollersheim*, the Ninth Circuit, based on an exhaustive analysis of the text, structure and legislative history of RICO, "h[e]ld that injunctive relief is not available to a private plaintiff in a civil RICO action." 796 F.2d at 1077. The Ninth Circuit began its analysis by canvassing the relevant case law and then carefully examining the text and structure of Section 1964. *Id.* at 1081-84; see also App., *infra*, 144a-145a (setting forth relevant text of Section 1964). The Ninth Circuit's textual analysis focused on part (c)), which "states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a)." 796 F.2d at 1082. The "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c))," the Ninth Circuit reasoned, "logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Id.* at 1083. It noted that while alternate readings of the statutory text are "plausible," the "legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action." *Id.* at 1084.

The Ninth Circuit conducted an extensive review of the legislative history, focusing on the rejection of various amendments. 796 F.2d at 1084-86. Thus, the court explained, "the House rejected an amendment, described as 'an additional civil remedy,' which would expressly permit private parties to sue for injunctive relief under section 1964(a)." *Id.* at 1085. Moreover, "in the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief." *Id.*

The Ninth Circuit found further support for its conclusion in the provision that served as a model for Section 1964(c) of

RICO: Section 4 of the Clayton Act, 15 U.S.C. § 15(a). As the Ninth Circuit explained, Section 4 does not authorize injunctions; private antitrust plaintiffs can "secure injunctive relief only by virtue of a separate section of the Clayton Act" – Section 16, codified at 15 U.S.C. § 26 – "which expressly provides for private equitable actions." 796 F.2d at 1087. RICO, however, "contains no parallel provision." *Id.* The court also relied on this Court's cases "sharply limit[ing] the implication of causes of action or remedies not expressly provided by statute," especially where, as here, "a statute provides an elaborate enforcement scheme." *Id.* at 1087-88 (internal quotations omitted).

2. The Seventh Circuit sharply disagreed with the Ninth Circuit's conclusion and reasoning in *Wollersheim*. App., *infra*, 6a-14a. The Seventh Circuit criticized the Ninth Circuit's analysis of the text and internal structure of Section 1964 as unreasonable, explaining that contrary to the Ninth Circuit's supposed assumption, Section 1964(a) "is not purely jurisdictional, but also describes remedies available under RICO." *Id.* at 9a. "Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)," the Seventh Circuit explained, "we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c))." *Id.* at 8a. The Seventh Circuit also offered a detailed critique of the Ninth Circuit's analysis. See pages 10-14, *infra*.

3. As the Seventh Circuit recognized (App., *infra*, 6a), the Second, Fourth, Fifth, and Sixth Circuits have all expressed serious doubts about the availability of injunctions in this setting – including in cases predating *Wollersheim*. See *Trane Co.* v. *O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (noting "serious doubt" expressed by other courts and stating, "We have the same doubts"); *Dan River, Inc.* v. *Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt"); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000) ("considerable doubt"); *Wheeling-Pittsburgh Steel Corp.* v. *Mitsui & Co.*, 221 F.3d 924, 927 n.2 (6th Cir. 2000) (agreeing in *dicta* that private litigants may not obtain injunctions). See OR Pet. 11-12 & nn.17-18.

The Fifth Circuit, moreover, has squarely addressed the narrower but related question whether RICO authorizes *preliminary* injunctive relief for a private plaintiff, and held that such relief is not available. *In re Fredeman Litig.*, 843 F.2d 821, 828 (1988). The Fifth Circuit explained that "while § 1964(b) expressly permits the government to seek equitable relief, § 1964(c), which concerns private plaintiffs, contains no such explicit grant." *Id.* at 829. Describing "the analysis contained in the *Wollersheim* opinion" as "persuasive" (*id.* at 830), the Fifth Circuit agreed with various rationales specifically rejected by the Seventh Circuit in this case. See *id.* at 829-30.

Although the Seventh Circuit indicated that other circuits have endorsed its position in *dicta* (App., *infra*, 6a), that is untrue. The Eighth Circuit did not agree in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), but rather expressly reserved the issue. One judge, writing separately, stated that he would uphold the availability of injunctive relief. *Id.* at 1365-66 (McMillian, J., concurring in part and dissenting in part). But Judge McMillian's discussion of this issue, which predated and thus did not have the benefit of *Wollersheim*, consisted of nothing but a long quotation from a law review article. Equally incorrect was the panel's suggestion (App., *infra*, 6a) that the First Circuit, in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845 (1990), agreed that injunctive relief is available. The First Circuit did no such thing. See *id.* at 848. Moreover, the vast majority of district courts have agreed with *Wollersheim*. See OR Pet. 11 & n.17 (collecting cases).

4. The Court should intervene now to resolve the square conflict between the Seventh and Ninth Circuits and bring uniformity to this important area of federal law. Federal law should not allow private parties to obtain injunctive relief in private RICO actions brought in the federal courts in Illinois, Indiana, and Wisconsin but not in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. Moreover, respondents in this case

have secured a nationwide injunction that is effective even in the Ninth Circuit, where (under *Wollersheim*) federal law does not authorize injunctive relief.

Nor is there any realistic possibility that the conflict will disappear. *Wollersheim* was decided fifteen years ago, and the Ninth Circuit has consistently applied its holding in subsequent cases. See, *e.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *Imagineering, Inc.* v. *Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993). As explained above, the analysis or result of *Wollersheim* has been endorsed by many courts. And in this case, decided by a unanimous panel, the Seventh Circuit denied a request for en banc rehearing without a single active judge requesting a vote, despite the panel's open disagreement with the Ninth Circuit. App., *infra*, 150a-151a.

B. *The Issue Is Important and Recurring*. Whether private plaintiffs may seek injunctive relief under RICO is an important question of federal law. As the many cases cited above demonstrate, this issue has arisen with frequency in the federal courts. See also OR Pet. 11-12 & nn.16-19. Moreover, it also arises in the state courts, which have concurrent jurisdiction over civil RICO actions. *Tafflin* v. *Levitt*, 493 U.S. 455 (1990); *e.g.*, *Nakash* v. *Superior Ct.*, 241 Cal. Rptr. 578, 584-85 (Cal. App. 1987). Because elements of a RICO claim have been interpreted broadly, this is a substantial category of litigation. In recent years, this Court has repeatedly granted review to resolve conflicts over the interpretation of RICO. The Court's extensive activity confirms not only RICO's ambiguity but also the national importance of questions arising under the statute.

C. *The Decision Below Is Wrong*. Contrary to the Seventh Circuit's conclusion, *Wollersheim* is correct. The language and structure of Section 1964, together with RICO's legislative history, amply demonstrate that Congress never intended to give private plaintiffs the right to obtain injunctive relief.

In concluding otherwise, the Seventh Circuit made a number of mistakes. *First*, it discounted *Wollersheim* on the ground

that the "decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly 'permits *the government* to bring actions for equitable relief.'" App., *infra*, 8a (quoting 796 F.2d at 1082). "Section 1964(b) does allow the government to seek equitable relief," the Seventh Circuit explained, "but it specifically mentions only *interim* remedies." *Id.* The suggestion that the Ninth Circuit somehow missed this distinction, and thought that Section 1964(b) authorized *permanent* injunctive relief, is baseless: elsewhere in its opinion, the Ninth Circuit stated that "part (b) grants the Attorney General the express power to seek *temporary* equitable relief." 796 F.2d at 1083. The Seventh Circuit's criticism is pure makeweight.

Second, the Seventh Circuit was wrong to suggest that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance upon legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 6a. Whatever skepticism individual Members of this Court may have expressed about the excessive reliance on legislative history in other statutory settings, the Court has repeatedly looked to legislative history for guidance in interpreting RICO. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 121 S. Ct. 2087, 2092 (2001) (unanimous); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000) (same); *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). In *NOW* v. *Scheidler*, this Court did not refuse on methodological grounds to look beyond RICO's text; it merely concluded that there was nothing in the legislative history – which, notably, "[b]oth parties rel[ied] on" – that would override statutory language that was "unambiguous." 510 U.S. at 261.

Third, the Seventh Circuit ignored the fact that not all "legislative history" is created equal. In particular, it gave short shrift to the legislative history – which this Court has "repeatedly" taken account of – showing that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); see also *Agency Holding Corp.* v. *Malley-*

Duff & Assocs., 483 U.S. 143, 150-51 (1987) ("Even a cursory comparison * * * reveals that the civil action provision of RICO was patterned after the Clayton Act."). This Court has also recognized that "Congress enacted § 4" using "language borrowed from § 7 of the Sherman Act." *Holmes*, 503 U.S. at 267. The language of the three provisions is virtually identical.

At the time RICO was enacted, this Court's decisions had clearly established that Section 4 of the Clayton Act does not allow private parties to seek injunctive relief. *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471 (1917); see also *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (same for Section 7 of Sherman Act). Moreover, one may

> fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes, 503 U.S. at 268 (citations omitted). In *Holmes*, the Court held that Section 1964(c), like the antitrust provisions it was modeled after, requires a showing of proximate causation. That logic applies with equal force here.[4]

Fourth, the Seventh Circuit ignored the fact that the "private treble-damages remedy" contained in Section 1964(c) was in fact added to a bill, S. 30, whose "civil remedies * * * were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." *Sedima, S.P.R.L* v. *Imrex Co.*, 473 U.S. 479, 486-87 (1985). Because Section 1964(c) was "a branch

[4] The Seventh Circuit sought to avoid this compelling evidence of Congress's intent by pointing to *another* provision of the Clayton Act, Section 16, which has no equivalent in RICO and expressly provides that "any person * * * shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26. In the Seventh Circuit's view, it was required by this Court's decisions "treat[ing] the remedial sections of RICO and the Clayton Act identically, regardless of *superficial* differences in language" (App., *infra*, 13a (emphasis added)), to read Section 1964(c) as if it represented some combination of Sections 4 and 16 of the Clayton Act. That logic is virtually self-refuting.

grafted onto the already completed-trunk of the statute" (*Fredeman*, 843 F.2d at 829), it was quite wrong for the Seventh Circuit to analyze it as if it were designed to be part of a carefully drafted and integrated whole (Section 1964). In fact, Section 1964(c) is properly understood as a limited, private remedy added to a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill 1983).

The statutory text strongly confirms the different origins and functions of Sections 1964(c) and 1964(b). Compare 18 U.S.C. § 1964(b) ("The Attorney General may *institute proceedings under this section.*") (emphasis added) with *id.* § 1964(c) ("Any person *injured* in his business or property by reason of a violation of section 1962 * * * may sue *therefor* * * * and shall recover *threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee*") (emphasis added). Section 1964(b)'s subsequent mention of interim relief is plainly a description of *supplemental* remedies available to the government, whereas it is possible to read Section 1964(c) as a complete listing of all relief available to private parties.

Fifth, the Seventh Circuit was wrong to suggest (albeit tentatively) that *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals *may* have followed in earlier years" (App., *infra*, 9a (emphasis added)). That case is far afield. It involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorized civil penalties and injunctive relief. The statute also contained a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that because Section 11046(c) referred to "jurisdiction," it followed that "all of the elements of a cause of action under [Section 11046(a)(1)]" implicated the court's subject-matter jurisdiction. 523 U.S. at 90. That holding has no relevance to *Wollersheim*, which may explain why respondents failed even to cite it in their brief in the Seventh Circuit. Nor has the Ninth

Circuit relied on an assumption that Section 1964(a) is "purely 'jurisdictional'" (App., *infra*, 8a-9a) in disallowing injunctive relief. Instead, the Ninth Circuit in *Wollersheim* relied principally on the statutory text and the compelling evidence in the legislative history described above. See pages 7-8, *supra*.

Finally, the Seventh Circuit made no attempt to address the reasons why Congress likely intended to vest the authority to seek injunctive relief under RICO exclusively in the hands of the federal government. See *Northern Sec. Co.*, 194 U.S. at 71 (noting that similar provision of Sherman Act "secur[ed] the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan" and shielded business defendants from vexatious lawsuits). Nor did the Seventh Circuit take account of the fact that if private litigants may secure injunctions under RICO, they would also be entitled to secure other forms of equitable relief – including equitable recission of contracts, disgorgement of profits, appointment of a receiver, issuance of writs of attachment, and even dissolution of a corporate defendant – that have the potential to cause substantial mischief to business and non-business defendants alike.[5]

II. This Court Should Resolve The Conflicts Over The Meaning Of Extortion Under The Hobbs Act

The Hobbs Act makes it a crime to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce [] by robbery or extortion * * *." 18 U.S.C. § 1951(a). It defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by the *wrongful* use of actual or threatened *force, violence, or fear* or under color of official right." *Id.* § 1951(b)(2) (emphasis added). A single violation of the Hobbs Act carries a punishment of up to 20 years, a fine, or both.

[5] The Seventh Circuit made other mistakes as well. For example, it ignored other evidence in the legislative record showing that Congress did not intend to authorize injunctions for private plaintiffs (see OR Pet. 16-19 & n.22), and it disregarded this Court's cases establishing that courts must be reluctant to read additional remedies into statutes that feature elaborate and well-defined enforcement schemes (see page 12-13, *supra*). See also OR Pet.14 n.21.

Petitioners were found to have committed 21 violations of the Hobbs Act as predicate offenses under RICO. This was possible, however, only because the trial court used an unduly expansive definition of the elements of Hobbs Act extortion. Over petitioners' objections, the jury was instructed that "[t]he term property right means *anything of value*, including *a woman's right to seek medical services from a clinic*, the right of doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services." Tr. 4945 (emphasis added). In closing argument, respondents' counsel emphasized to the jury that "[p]roperty rights include a woman's right to choose." Tr. 4987. The trial court did not define the term "obtain"; instead, it instructed the jury that class members must have "*give[n] up* a property right," and that "[i]t does not matter whether or not the extortion provided an economic benefit to [defendants]." *Id.* (emphasis added).[6]

On appeal, petitioners challenged the jury's instructions and findings under the Hobbs Act on various grounds. The court made short work of these objections, dismissing them as part of "a hodgepodge" of challenges, "none of which need detain us long." App., *infra*, 25a. "Property," the Seventh Circuit reasoned, easily encompasses "intangible" economic or liberty interests such as those involved here. *Id.* at 29a. As for "obtaining," the court explained that "an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else" – a "loss to, or interference with the rights of, the victim is all that is required." *Id.* (internal quotations omitted).

[6] The jury was instructed that "fear" could include "not only fear of physical violence but fear of *wrongful economic injury*." Tr. 4945 (emphasis added); see also *id.* ("Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats."). Among other things, respondents argued to the jury that abortion protesters' use of sit-ins to obstruct access to clinics constituted "force" – and the concern engendered in the clinics about the economic effects of such sit-ins constituted "fear" – within the meaning of the Hobbs Act. See Tr. 5005-08, 5037.

The Seventh Circuit's interpretation of the Hobbs Act conflicts with the decisions of other circuits and this Court. It also represents an unwarranted departure from the common-law meaning of extortion. If left uncorrected, it will no doubt contribute to the growing tendency to use civil RICO – predicated on broad Hobbs Act claims – against all manner of protesters, a development that raises serious First Amendment concerns.

A. *The Conflicts in the Lower Courts*. 1. Although the Hobbs Act explicitly states that "extortion" means the "*obtaining* of property from another" (see 18 U.S.C. § 1951(b)(2) (emphasis added)), the Seventh Circuit held that neither petitioners nor anyone else needs to actually receive any property from the victims. Accord *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000).

The Ninth Circuit recently reached the opposite conclusion in *United States* v. *Panaro*, 266 F.3d 939 (2001). In that case, the organized crime defendants were convicted, among other things, of Hobbs Act extortion for their involvement in forcing a business associate to give up his interests in an auto shop and a loansharking business. *Id.* at 947. On appeal, defendants argued that the evidence was insufficient to sustain their convictions. *Id.* In rejecting that argument, the Ninth Circuit explicitly addressed the "obtaining" element:

> The four conspirators sought not only to put [the associate] out of business, but actually to *get his business for themselves*. That is important with regard to the "obtaining" element of the Hobbs Act.

Id. (emphasis added). "[U]nder the Hobbs Act," the court explained, "extortion, which is a larceny-type offense, *does not occur when a victim is merely forced to part with property*. Rather, there must be an 'obtaining': someone – either the extortioner or a third person – must *receive* the *property* of which the victim is deprived." *Id.* at 947-48 (emphases added); accord *United States* v. *Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958) (no "taking or obtaining" under related Hobbs Act provision prohibiting robbery where defendants used physical force and violence to interfere with an owner's dominion and control over his truck and delay its movement).[7]

If this case had been brought in the Ninth Circuit, petitioners would not have been found to have violated the Hobbs Act. As a result of their actions, neither petitioners nor anyone else received respondents' "property" (*i.e.*, their interests in seeking or providing abortions or other services). Indeed, even assuming that those interests qualified as "property," they were not susceptible to being "obtained" (as opposed to being destroyed or diminished). All that the jury could have found – and all the jury was required to find under the flawed instructions given in this case – was that respondents were "forced to part" with those rights. This is plainly insufficient under *Panaro*. The Court should intervene now to resolve the conflict between the Seventh and Ninth Circuits.

2. The Seventh Circuit also concluded that "property" included "the class women's rights to seek medical services from the clinics." App., *infra*, 29a. By expanding the term "property" to encompass the right to seek clinic services, the lower court placed itself into conflict with the Second Circuit.[8]

---

[7] *United States* v. *Green*, 350 U.S. 415 (1956), is not to the contrary. In holding that unions and their officials could violate the Hobbs Act by attempting to obtain benefits for union members, the Court stated that "extortion as defined in the statute in no way depends upon having *a direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis added). The Court did *not* say that property need not be obtained; it simply stated that the property could be obtained for the benefit of someone other than the defendant. *Id.*; accord *Panaro*, 266 F.3d at 947-48.

[8] Although at common law the crime of extortion covered the taking of "money" or any other "*thing* of value" by a public official, see *Evans* v. *United States*, 504 U.S. 255, 279 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (internal quotations omitted; emphasis added), courts have consistently ruled that the Hobbs Act's reference to "property" extends beyond tangible items to intangible forms of property. It does not follow, however, that every economic interest constitutes "property" (see note 13, *infra*), much less that social or political rights and liberty interests are included within that term. Certain intangible property interests are incapable of being "obtained" (as opposed to impaired or destroyed).

In the Second Circuit, "property" must be economic. In *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), the town brought a RICO action against protesters, alleging extortion under the Hobbs Act as a predicate offense. The town claimed that the protesters had attempted to extort a "softened police response" to future protests and a reduction or abandonment of the criminal charges against arrested protesters, and had caused the town to incur overtime police expenses. The court first noted that "'property' under the [Hobbs] Act includes, in a broad sense, any valuable right *considered as a source or element of wealth*, including a right to solicit business." *Id.* at 101 (internal quotations omitted; emphasis added). Using this definition, the Second Circuit reasoned, the town's claimed interests – including its interest in avoiding higher costs of operation – could not be considered "property." *Id.* at 102. Indeed, the court sharply criticized the town's theory as "blatantly implausible" and falling outside "any coherent meaning" of the language used in the Hobbs Act. *Id.* at 101-02; see also *G.I. Holdings, Inc.* v. *Baron & Budd*, 2001 WL 1598340, at *22 (S.D.N.Y. Dec. 1, 2001) (right of business to petition government for economic legislation not "property" under Hobbs Act).

A woman's right to seek services offered by a clinic is not "a source or element of wealth," and, therefore, would not be "property" in the Second Circuit (though the clinics' and doctors' rights to conduct their business might satisfy the Second Circuit's test). Moreover, the same result would obtain in the First Circuit, for a related reason: lack of standing under Section 1964(c) of RICO. See *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) (patient "deterred from entering the clinic for her appointment" lacked standing because she had not "suffered any injury to business or property"). Thus, the Seventh Circuit's definition of "property" is broader than in other circuits. Had this case been brought in the First or Second Circuit, the extortion claims of NOW and the class of women it represents would have failed for failure to allege a loss of "property" within the

meaning of 18 U.S.C. §§ 1951(b)(2) and 1964(c).[9]

3. The Seventh Circuit's analysis is also in considerable tension with this Court's decisions. For example, in *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of physical violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had not obtained property by the "*wrongful* use of actual or threatened violence, force, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)), because they had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

In describing the "property" sought to be "obtained" from the employer, the Court in *Enmons* focused solely on the higher *wages* the union sought to win for its members; there was no hint that the destruction of the employer's transformer, or the interference with its business operations during the strike, in any way amounted to the "obtaining" (as opposed to the *destruction*) of "property." Indeed, if the latter had been true, the result would have been different in *Enmons*, because the Court there reasoned that "the obtaining of property" is "wrongful" within the meaning of the Hobbs Act only where "the alleged extortionist *has no lawful claim to th[e] property*." 410 U.S. at 400 (emphasis added). Because the defendants *did* have a lawful claim to higher wages, their activities were not "wrongful." But plainly the same could not be said for the destruction of the employer's transformer and damage to its facilities. The defendants had no lawful claim to *that* property. Accordingly, if "the obtaining of property" means what the Seventh Circuit says it means, the convictions would have been upheld in *Enmons*, and

---

[9] As explained above (at 5), the damages awarded to Summit and DWHO were *not* for lost profits but rather for *increased security costs* they incurred as a consequence of protest activity. Compare *Town of West Hartford*, 915 F.2d at 102 (incurring "overtime police expense[s] as a result of" protests "does not provide a colorable basis to claim a Hobbs Act violation").

the Hobbs Act would regulate a wide array of strike activity.[10]

The Seventh Circuit's sweeping definition of "property" is also difficult to reconcile with *McNally* v. *United States*, 483 U.S. 350, 356 (1987), which held that "the intangible right of the citizenry to good government" is not "property" that can be "obtain[ed]" within the meaning of the mail fraud statute, 18 U.S.C. § 1341. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous," this Court explained, "we read § 1341 as limited in scope to the protection of property rights." 483 U.S. at 360. The "right" to seek clinic services is not analytically different from the "right" to good government – both are civil liberties, not property.

B. *The Issue Is Important and Recurring*. "Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction * * *." *Evans* v. *United States*, 504 U.S. 255, 290 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Although several federal statutes criminalize extortion, "[p]rosecutors prefer" the Hobbs Act "because it carries a twenty year maximum sentence." Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 816 (1988). The Hobbs Act is also commonly invoked as a predicate act of racketeering in criminal prosecutions and private civil actions brought under RICO.

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. When this case was previ-

[10] In the lower courts, petitioners objected to the broad instruction on "fear" (see note 6, *supra*) and argued that their conduct fell outside the scope of the Hobbs Act under *Enmons* because their objective was to stop abortion, which was legitimate even if the means used sometimes were unlawful. See *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 274 (1993); *Town of West Hartford*, 915 F.2d at 106 (Kearse, J., dissenting) (expressing "serious doubts" that the defendants' "allegedly extortionate actions," including "resisting arrest" and "threatening to renew their demonstrations," constitute the "wrongful use of actual or threatened force, violence, or fear" under the Hobbs Act). Although it rejected the latter argument, the trial court acknowledged that petitioners' "ends" were "constitutionally protected." App., *infra*, 145a. The Seventh Circuit simply ignored these arguments.

ously before this Court, Justice Scalia asked counsel whether it was sufficient under the Hobbs Act to "intimidat[e]" the victim "into not doing something," or whether, instead, it must be proven that the defendant "g[o]t money or property" from the victim. No. 92-780 Oral Arg. Tr., 1993 WL 757635, at *13; *id.* at *21-22. The "combination" of a "broad interpretation of extortion" and RICO, he observed (*id.* at *23-24), creates

> a situation where any * * * national organization which has adherents and hangers-on who may commit a tort, hitting someone with a picket sign or trespassing upon property, by committing an unlawful act can be charged with committing extortion even though they're not trying to get money. * * * [I]f it were applied to the NAACP in the days of civil rights activism, it would have been very debilitating.

On remand, the district court agreed that "this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience," but stated that this argument "works in [respondents'] favor" because those protesters were "arrested, jailed, and otherwise punished." App., *infra*, 73a; see also Tr. 4339-40. Academic commentators have also voiced concerns. See, *e.g.*, Bradley, NOW v. Scheidler: *RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 161-67; Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

Nor is this case an isolated example. In the past decade, RICO has repeatedly been deployed against abortion protesters, with mixed success.[11] There is no reason why, if the Seventh Circuit's interpretation is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights – a point respondents' counsel conceded in her closing argument. Tr. 4963 (RICO "enterprise" could consist of "an animal rights

[11] See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995).

group that bars entry to a restaurant that serves veal"). Indeed, because the statute extends to the "wrongful" use of "threatened * * * fear" (18 U.S.C. § 1951(b)(2)) – including, under the jury instructions in this case, fear "of wrongful economic injury" (Tr. 4945) – almost any economic boycott by consumers is now actionable under RICO in the Seventh Circuit.[12] The fact that the Hobbs Act also punishes *attempts* and *conspiracies* to commit "extortion" (18 U.S.C. § 1951(a)) only enhances the threat to civil liberties presented by the Seventh Circuit's construction.

C. *The Decision Below Is Wrong*. Review should also be granted to correct the Seventh Circuit's unnatural and manifestly incorrect reading of the Hobbs Act. As a matter of common usage, to "obtain" something means to "acquire," "procure," "get hold of" or "gain[] possession of" it. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000); BLACK'S LAW DICTIONARY 972 (5th ed. 1979). To destroy or diminish the value of someone else's property is not the same as to "obtain" it. Thus, the lower court was wrong to say that all that was required for "obtaining" was "a loss to" the victim or an "interference with the [victim's] rights." App., *infra*, 29a.

Equally far-fetched as a linguistic matter was the Seventh Circuit's conclusion that the "right[] to seek medical services from the clinics" qualified as "property" capable of being extorted in violation of the Hobbs Act. No ordinary speaker of the English language, we submit, would describe a prospective patient's interest in obtaining services as "property." Put differently, "property" is simply not the same as liberty. If it were, all manner of conduct proscribed by state law – commission of a tort, breach of contract, disturbance of the peace, even loitering – could be transformed into Hobbs Act extortion if such conduct adversely affected the ability of customers to patronize a business. That cannot be the law.

---

[12] See also Lindgren, 35 UCLA L. REV. at 834-35 (noting that "the meaning of 'fear'" in the Hobbs Act "is ambiguous," and pointing out that "[f]ear is present in many valid economic transactions," such as where a bank "uses the fear of foreclosure to collect on a delinquent loan" or an employer uses the fear of termination to induce a worker "to come[] to work on time").

Moreover, as this Court made clear in *Evans* v. *United States*, when Congress enacted the Hobbs Act in 1946, it drew upon New York law in defining the terms "extortion" and "robbery." 504 U.S. at 264-65; see also *Enmons*, 410 U.S. at 406 n.16. Under New York law, "it was well settled that extortion required an unlawful taking." Bradley, 1994 SUP. CT. REV. at 140. The same is true today. See N.Y. PENAL LAW § 155.05.2(e) (McKinney 2001) ("a person obtains property by extortion when he compels or induces another person *to deliver such property to himself or to a third person*") (emphasis added). What petitioners are alleged to have done here is more appropriately described under New York law as "coercion in the second degree," which occurs when someone "compels or induces a person to * * * abstain from engaging in conduct in which [the victim] has a legal right to engage" by "instilling * * * fear." *Id.* at § 135.60; accord Bradley, 1994 SUP. CT. REV. at 140-41 (noting that coercion is not a predicate offense under RICO). "Coercion" is not the same as "extortion."[13]

The Seventh Circuit's decision also gives short shrift to the serious implications its broad reading of the Hobbs Act poses

---

[13] Use of a broad definition of "property" gives rise to serious line-drawing problems. For example, respondents argued to the jury that "[e]ven a *few hours* of deprivation of legal rights" caused by a sit-in "will satisfy the RICO act of extortion." Tr. 5008 (emphasis added). A broad definition also seriously blurs the line between extortion, which punishes wrongful obtaining "with [the owner's] consent," and robbery, which punishes the unlawful obtaining of certain property "against [the owner's] will." 18 U.S.C.§ 1951(b)(1), (2). In this case, for example, much of the interference with the operation of abortion clinics and the freedom of their customers occurred "against [their] will." Under the Seventh Circuit's sweeping definitions of "property" and "obtaining," political protesters engaged in demonstrations and sit-ins that disrupt businesses could also be indicted for "robbery" under the Hobbs Act. Yet something is amiss with an approach that yields such a ludicrous result. Nor should the line between "robbery" and "extortion" hinge, for example, on whether a business targeted by political protesters voluntarily closes its doors for the day (or a few hours) to avoid disruption. Equally troubling are the implications of the Seventh Circuit's broad reading of "property" and "obtaining" for the scope of "extortion" by a public official "under color of official right." *Id.* § 1951(b)(2). See OR Pet. 20-21.

not only for civil liberties (see pages 21-22, *supra*) but also for federalism. The Seventh Circuit's interpretation has the potential to federalize all manner of traditional state offenses – such as trespassing and breach of the peace – into Hobbs Act violations punishable by 20-year sentences. But courts must not be "quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The decision below also fails to give appropriate weight to the rule of lenity. See *McNally*, 483 U.S. at 359-60.

Finally, there are additional reasons to doubt that Congress intended the Hobbs Act to be used in conjunction with RICO against political protesters. First, as the legislative history of RICO makes clear, an early version of the statute was narrowed in response to concerns expressed by the Justice Department and ACLU that it was too broad and might otherwise be applied to anti-war protesters. Note, 75 NOTRE DAME L. REV. at 696-97. Second, as explained above, RICO was modeled after the antitrust laws, which do not reach political protest activities (including boycotts by individuals who are not seeking an economic advantage). See *FTC* v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S.411, 426-27 (1990). Third, it is difficult to see why Congress in 1994 would have enacted the Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248, if it believed that RICO, combined with the Hobbs Act, *already* reached the physical obstruction of access to abortion clinics. And fourth, RICO's severe criminal penalties and forfeiture provisions, and its quasi-punitive provision for treble damages, make its application to protesters inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

III. The Court Should Review The Seventh Circuit's Holding That The Jury's Imposition Of Liability And Treble Damages Under RICO Satisfied The Exacting Standards Of *NAACP* v. *Claiborne Hardware Co.*

The Seventh Circuit's decision also merits review because it substantially erodes the judicial safeguards required under this Court's decisions to ensure that civil liability does not intrude on the sphere of activities protected by the First Amendment, including the freedom of association and speech. More specifically, the Seventh Circuit's holding and analysis are inconsistent in several respects with this Court's unanimous decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), and with a decision of the Second Circuit.

A. *Claiborne* involved a tort action brought in state court against black protesters engaged in a collective, organized effort to boycott white merchants in Claiborne County, Mississippi. The boycott, which was aimed at pressuring the merchants to address demands for racial equality by threatening them with "economic ruin," lasted for seven years and included multiple acts of physical force and violence, threats, and intimidation targeting the merchants as well as their customers. 458 U.S. at 892 n.8, 898, 903-06. Emphasizing the profound importance of "the freedom of association," this Court explained that "the presence of activity protected by the First Amendment imposes restraints" not only "on the grounds that may give rise to damages liability" but also "on the persons who may be held accountable for those damages." *Id.* at 916-17.

The Court went on to identify three principles that courts must apply in this setting to safeguard First Amendment freedoms. *First*, civil liability may not be imposed "merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." 458 U.S. at 920. *Second*, in addition to this limit on the imposition of *any* civil liability, the Court indicated that the *scope of relief* must also be closely tailored to the unprotected conduct. "While the State may legitimately impose damages for the consequences of *violent* conduct, it may not award compensation for the consequences of *nonviolent, protected activity*." *Id.* at 918 (emphasis added). "[O]nly those losses *proximately caused by unlawful conduct*," the Court explained, "may be recovered." *Id.* (emphasis added). The Mississippi Supreme Court's decision failed to

satisfy this requirement, the Court reasoned, because it upheld the trial judge's award of damages for *all* business losses sustained by the merchants during the entire seven-year protest even though certain losses plainly "were not proximately caused by the *violence and threats of violence*" that had occurred. *Id.* at 921 (emphasis added).

Third, this Court reaffirmed the importance of precise findings in the trial court and searching appellate review. The judiciary has a "special obligation" in this setting, the Court explained, to "examine critically the basis on which liability was imposed" by conducting "an independent examination of the whole record." 458 U.S. at 915 & n.50 (internal quotations omitted); see *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984). It faulted the Mississippi trial judge for failing to "*specifically identify* the evidence linking any of the defendants" to a purported agreement to use force, violence and threats to effectuate the boycott, and criticized the state supreme court for relying on "ambiguous findings" that failed to "differentiat[e]" the exact conduct of individual defendants and therefore were "inadequate to assure the *precision of regulation* demanded by" the First Amendment. *Id.* at 895, 920-21, 925, 934 & nn.15, 69 (emphasis added; internal quotations omitted).

B. The Seventh Circuit acknowledged that petitioners, like the protesters in *Claiborne*, had "engaged in a substantial amount of protected speech," including "picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions." App., *infra*, 14a. It also agreed that liability "cannot constitutionally be imposed" for this "portion of their conduct," which was "closely intertwined with" the unprotected conduct. *Id.* And it acknowledged that *Claiborne* "is directly applicable to this case." *Id.* at 18a. The Seventh Circuit ruled, however, that the requirements of *Claiborne* were fully satisfied. In so doing, the court focused almost exclusively on compliance with the first *Claiborne* principle, ignored entirely the second principle, and failed to discharge its obligation to ensure the "precision of regulation" required by the First Amendment.

To see why this is so, it is necessary to understand the safeguards that the trial court imposed (and refused to impose) on the jury's factfinding in this case. Despite the welter of evidence presented to the jury of events and incidents involving thousands of protesters over a 15-year period, the district court refused petitioners' repeated requests that the jury be required, through the use of a detailed special verdict form, to identify the "predicate acts" on which it rested any ultimate finding of RICO liability. The jury was also instructed that to prove their RICO claims, respondents need not show that *petitioners themselves* committed the requisite predicate acts; it was enough if "*other people* associated with PLAN" committed those acts. Tr. 4943 (emphasis added). In addition, the jury was not instructed that it *had to agree* on the *same* predicate acts. And it was instructed that any finding of proximate cause need not rest on the unspecified "predicate acts"; it could instead be based on "any overt act taken in furtherance of PLAN's goal." Tr. 4948.[14]

Taken together, these jury instructions make it impossible to determine whether the jury's imposition of liability on the RICO claims, or its exaction of punitive damages, complied with the limits imposed by *Claiborne*. As the district court candidly admitted, "the jury did not state which defendants did the[] [predicate] acts or when they occurred, only the total number of acts" and, for that reason, the court simply "d[id] not know which evidence the jury relied upon in its findings." App., *infra*, 126a. Plainly, the Seventh Circuit was in no better position to divine the basis for the jury's decision. All that we know – and all the Seventh Circuit could have known – is that the jury found 21 unspecified violations of the Hobbs Act (as well as

[14] The proximate causation instruction was plainly erroneous under *Beck* v. *Prupis*, 529 U.S. 494 (2000), and *Sedima*, 473 U.S. 479, which make clear that even with respect to a Section 1962(d) conspiracy claim under RICO, proximate causation must be based upon predicate acts and not on overt acts. Similarly, the absence of a unanimity instruction as to predicate acts was inconsistent with *Richardson* v. *United States*, 526 U.S. 813 (1999) (involving the analogous Continuing Criminal Enterprise statute). The Seventh Circuit simply ignored these errors. The relevant portions of the jury instructions are reproduced at App., *infra*, 146a-157a.

various other unspecified predicate acts) committed by unidentified persons. See pages 4-5 and note 3, *supra*.

The instructions used by the trial court were manifestly "inadequate to assure the *precision of regulation* demanded by" the First Amendment. 458 U.S. at 895 & n.15, 920-21; see also *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729, 732-35 (1966). Despite the trial court's obvious failure to comply with *Claiborne*, the Seventh Circuit refused to disturb the liability judgment. It relied largely on the fact that the jury was given an instruction patterned after *Claiborne* (No. 30), which stated that "in order to find the defendants liable," the jury had to "conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." Tr. 4949. The Seventh Circuit brushed aside petitioners' other arguments about the defects and ambiguities in the jury instructions relevant to their First Amendment challenge, reasoning that appellate review of the jury instructions is "deferential" and limited to determining whether, taken as a whole, the instructions "adequately informed the jury of the applicable law." App., *infra*, 21a.

This analysis is flawed at every turn. First, the Seventh Circuit's application of "deferential" review is squarely at odds with this Court's teaching that the First Amendment imposes a "special obligation" on appellate courts to conduct a searching review. No such deference was accorded to the Mississippi courts in *Claiborne*, and none was warranted here. See *Gibbs*, 383 U.S. at 732-35 (evaluating jury instructions in analogous context). Second, Instruction 30 was limited in its effect. All the instruction did was to inform the jury that it should observe the *first* limitation on liability recognized in *Claiborne*; it said nothing at all about the *second* limitation on the award of damages. See also Tr. 4360-61 (trial court refused to give jury instruction on second *Claiborne* limitation). Third, Instruction 30 did not (and could not) discharge the "special obligation" of *reviewing courts* to ensure that the jury honored the limits imposed by the First Amendment, much less produce the kind of specific, particularized findings needed for appellate review. Fourth, Instruction 30 was marred by ambiguities that rendered it of dubious value even for ensuring that the jury complied with the first *Claiborne* limitation. See OR Pet. 28. For example, it referred broadly to "unlawful acts" without specifying that such acts had to be the predicate acts of racketeering found by the jury (not other acts, such as trespassing, made illegal by state law).[15]

The Seventh Circuit's decision also strays from *Claiborne* by upholding a damages award that plainly violates the *second* limitation recognized in that case: "only those losses *proximately caused by unlawful conduct*" – and, in particular, by "*violent* conduct" – "may be recovered." 458 U.S. at 918 (emphasis added). As just explained, the instructions all but invited the jury to exceed that limitation by authorizing damages for "overt acts" done by persons other than petitioners. Nor did the Seventh Circuit *even attempt* to discharge its obligation to conduct a searching review of whether the damages award satisfied the *second* requirement of *Claiborne*. Had it done so, it would have concluded that the award cannot possibly be sustained. Indeed, it may well be that a treble damages award, by its very nature, runs afoul of the second *Claiborne* principle.[16]

To be sure, the Seventh Circuit did attempt to conduct an independent review of whether the judgment of liability satisfied the first *Claiborne* requirement. App., *infra*, 18a-22a. The jury's apparent conclusion that Instruction 30 was satisfied, the court explained, was supported by the record because respondents had presented "ample evidence that the individual defendants and others associated with PLAN had engaged in illegal

---

[15] The district court's decision to give Instruction 30, moreover, came only after the parties had rested. During the trial, the district court repeatedly refused petitioners' requests to put on evidence of their specific intent, yet Instruction 30 turned on whether they possessed such intent.

[16] The jury's verdict suggests that it found only four discrete acts or threats of violence. See note 3, *supra*. There is no basis for concluding that the increased security costs underlying the damages awarded to Summit and DWHO flowed from those unidentified acts of violence, which were the only permissible basis for damages. See also OR Pet. 28-29.

conduct." *Id.* at 17a (emphasis added).[17] But again, even putting aside the fatal ambiguity of terms like "unlawful conduct" (which do not necessarily denote the predicate crimes), this analysis is flawed because it is impossible to know which predicate acts the jury relied on in imposing liability.

C. The Seventh Circuit's lax approach contrasts sharply with the more stringent approach taken by other courts of appeals. In a recent case involving the FACE Act, for example, the Second Circuit vacated a preliminary injunction in part because the trial court failed to make specific findings relating to an individual defendant. *New York* v. *Operation Rescue Nat'l*, 273 F.3d 184, 198-200 (2001). Had the Seventh Circuit applied an equally stringent approach, it could not have upheld either the judgment of liability or the damages award in this case.

D. Finally, this case presents an excellent vehicle for clarifying the proper application of First Amendment safeguards and the principles of *Claiborne* to decisionmaking by juries. As the Seventh Circuit noted, cases like *Claiborne* and *Bose* involved factfinding by courts. App, *infra*, 15a-16a. The Court should take this opportunity to provide greater guidance to the lower courts faced with the difficult challenges of protecting First Amendment rights in RICO cases of this sort.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[17] Like the opinion's early catalogue of "[a] few of the more egregious acts the plaintiffs *alleged*" (App., *infra*, 4a-5a (emphasis added)), the evidence cited in support of this conclusion consisted mostly of the conduct of unidentified "protesters." *Id.* at 17a. The evidence cited of unlawful conduct *by petitioners themselves*, in contrast, consisted primarily of *participation in political meetings and speech itself*. See *id.* at 5a, 17a, 19a. Apparently relying on its broad interpretation of extortion under the Hobbs Act, the Seventh Circuit held that certain letters sent by petitioner Scheidler, which asked clinics to honor a "Christmas Truce" and voluntarily close on a particular day (and stated that noncomplying clinics would be subjected to "non-violent direct action"), "constituted true threats outside of the protection of the First Amendment." *Id.* at 5a, 17a. But cf. *Claiborne*, 458 U.S. at 927-29 (holding that Charles Evers's speeches, which included "references to the possibility that necks would be broken," were constitutionally protected).

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

JANUARY 2002

APPENDICES

APPENDIX A

United States Court of Appeals
for the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891, 99-3892
and 01-2050

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware and Summit Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed,
Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue,
Defendants-Appellants.

Argued Sept. 14, 2000.
Decided Oct. 2, 2001.
Petition for Rehearing and Rehearing En Banc
Denied Oct. 29, 2001.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury found for the plaintiffs and awarded damages to the two named

clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (*NOW I*), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62, 114 S. Ct. 798. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.

At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protest-

ers reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

In several instances, protesters entered clinics and destroyed medical equipment.

In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $163,000 to Summit Women's Health Organization and over $94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. Compare *Johnson v. Collins Ent'mt. Co.*, 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); see also *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. See *Alexander v. Sandoval*, 531 U.S. 1049, 121 S. Ct. 1511, 1520-21 & n. 7, 149 L. Ed. 2d 517 (2001); *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim*, they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by

other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim*, 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "[t]he Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court. . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the

Ninth Circuit's characterization of it in that way in *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The statute at issue in *Steel Co.* provided that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'[j]urisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants' view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, see *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("courts should disfavor interpretations of

statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. See, *e.g., Cedric Kushner Promotions, Ltd. v. King*, --- U.S. ---, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States*, 522 U.S. 52, 61-66, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (rejecting requirement that conspiracy defendant himself has committed

predicate acts); *NOW I*, 510 U.S. at 256-62, 114 S. Ct. 798 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff has suffered a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n. 10, 105 S. Ct. 3275. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after

another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. See *id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. *Id.* at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a particularly thin reed on which to rest the interpretation of a statute. See, *e.g.*, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's

reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim*, we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First, the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code[1] and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. See, *e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S.

---

[1] The remedial provisions of the Clayton Act are actually spread over far more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (*parens patriae* suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, see *California v. American Stores Co.*, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id.* at 285, 110 S. Ct. 1853. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the

First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501, 104 S. Ct. 1949. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is

required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the con-

duct if such regulation is necessary to serve important government interests. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment is such an important government interest. See, e.g., *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); *Madsen*, *supra*, 512 U.S. at 768, 114 S. Ct. 2516. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and provide medical care. In a case where a similarly important governmen-

tal interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected speech activities. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09, 102 S. Ct. 3409. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920, 102 S. Ct. 3409.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN

itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

> 1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?
>
> 2. Were the . . . defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with.")
>
> . . .
>
> 4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

> *Jury Instruction No. 20*: Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

> *Jury Instruction No. 30--Defendants' Liability for Acts of Others*: Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not adequately protect their First Amendment rights, because the Claiborne Hardware standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth,* 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instruc-

tions they are given. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the

> "Acts") through any of the Defendants or through others; or
>
> c. Operating an enterprise through any of the Acts described above.
>
> This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:
>
> a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;
>
> b. Making speeches on public property;
>
> c. Speaking to individuals approaching the clinic;
>
> d. Handing out literature on public property; and
>
> e. Praying on public property.
>
> This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have

never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still ensuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct – trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and

protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy – on either side – away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was

limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell out of the case, the effect was the same as a final judgment against NOW, and *res judicata* barred the plaintiffs from amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which *res judicata* principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. See *United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); see also *Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, see 510 U.S. at 256, 262, 114 S. Ct. 798, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that lawsuit without

prejudice as to most of the defendants. However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list *res judicata* based on the Wisconsin litigation as an affirmative defense in their trial brief, and accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some mem-

bers of the class. Class certification decisions are committed to the discretion of the district court, however, see *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18 U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, in-

duced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, see, *e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21 predicate acts under the Hobbs Act alone, which is far in excess of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional

state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J & W Fence Supply Co. v. United States*, 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge*, 230 F.3d at 1052, or to put forth evidence that is not material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing

reasons, the judgment of the district court is AFFIRMED in all respects.

APPENDIX B

United States District Court,
N.D. Illinois,
Eastern Division.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiffs,

v.

Joseph M. SCHEIDLER; Pro-Life Action League, Inc.; Randall A. Terry; Andrew Scholberg; Conrad Wojnar; Timothy Murphy; Monica Migliorino; Vital-Med Laboratories, Inc.; Project Life; and Operation Rescue, Defendants.

No. 86 C 7888.
July 25, 1995.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

Background

This nine-year-old case has a long and convoluted history, portions of which must be reviewed in order to understand the issues before the court. For a more detailed exposition of the facts and procedural history of this case, please refer to *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

In 1986, plaintiffs National Organization for Women ("NOW"), and two women's health centers brought this action against various anti-abortion activists, anti-abortion organizations, and a pathology testing laboratory. They alleged that defendants conspired to drive out of business health centers that provide abortion services. Plaintiffs contended that defendants committed extortion, engaged in physical and verbal intimidation, destroyed property, orchestrated phone campaigns to tie up clinic phone lines, made false appointments at the clinics, and disrupted the clinics' relationship with their landlords – all in violation of the Sherman Antitrust Act and sections 1962(a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also raised several pendent state claims.

On May 28, 1991, the district court dismissed the Second Amended Complaint. *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court held the Sherman Act inapplicable to the conduct alleged in the complaint because defendants' conduct was incidental to a valid effort to influence governmental action and therefore immune. The court dismissed the § 1962(a) RICO claim because defendants' receipt of donations from supporters was not income derived from racketeering. The § 1962(c) RICO claim was dismissed because the court concluded that RICO requires that economic motive be alleged. The RICO conspiracy count was dismissed because all substantive RICO counts failed. The state law claims were also dismissed because the dismissal of the claims based on federal law destroyed the basis for jurisdiction over the state law claims. The plaintiffs appealed.

On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). The plaintiffs sought and obtained a writ of certiorari from the United States Supreme Court limited to the question of whether a RICO violation required motivation by an economic purpose. *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

On January 24, 1994, the Supreme Court reversed. *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994). The Court held that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. In a concurring opinion, Justice Souter emphasized that although the First Amendment does not require reading an economic motive into the unambiguous RICO statute, legitimate free speech issues may be implicated in this case. Justice Souter advised that those concerns should be addressed as they arise. The defendants petitioned for a rehearing, which was denied on March 21, 1994. *NOW v. Scheidler*, 510 U.S. 1215, 114 S. Ct. 1340, 127 L. Ed. 2d 688 (1994).

On October 3, 1994, in an unpublished opinion, the Seventh Circuit recapitulated the Supreme Court's opinion. The Court of Appeals directed the district court to address the issue of whether the predicate acts alleged in the complaint in fact violated the Hobbs Act (18 U.S.C. § 1951). The court specifically reaffirmed its original dismissal of the Sherman Act count and RICO § 1962(a). The court further stated:

> The Supreme Court's decision reinstated count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.
>
> Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler*, 510 U.S. at --- n. 6, 114 S. Ct. at 806 n. 6. As Justice Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at ---, 114 S. Ct. at 807 (Souter, J., concurring). This includes Hobbs Act extortion – the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

NOW v. Scheidler, 25 F.3d 1053, 1994 WL 196761 (7th Cir. 1994). The case was remanded to the district court for further proceedings.

Before the district court could comply with the mandate of the Court of Appeals, the plaintiffs filed a motion for leave to file a third amended complaint. On October 21, 1994, Judge Holderman granted plaintiffs' motion and ordered plaintiffs to file an updated RICO case statement (Tr. p. 31). The Third Amended Complaint (hereinafter the "Complaint") has four counts.

Count I of the Complaint is brought by all plaintiffs[1] and alleges violations against all defendants except Vital-Med Laboratories, Inc. ("Vital-Med").[2] Count I also alleges that the defendants violated RICO by participating in the Pro-Life Action Network ("PLAN"), which the plaintiffs allege is an enterprise as defined by 18 U.S.C. § 1961(4). Several distinct predicate acts are alleged under count I. These acts include attempted arson, murder, and various Hobbs Act violations. Count II of the Complaint alleges that all defendants except Vital-Med conspired to violate the RICO Act. Count III is brought by DWHO and Summit and alleges that defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL tortiously interfered with the plaintiffs' prospective economic advantage. Count IV is brought by Summit alone and alleges that defendant Migliorino tortiously interfered with an existing business relationship between Summit and Summit's prospective lessor.

---

[1] The plaintiffs in this action are: NOW, on behalf of itself and its members and others who use or may use the services of women's health centers that provide abortions, the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("Summit"), on behalf of themselves and similarly situated clinics.

[2] The other defendants in this action are Joseph Scheidler ("Scheidler"), the Pro-Life Action League ("PLAL"), Randall Terry ("Terry"), Andrew Scholberg ("Scholberg"), Conrad Wojnar ("Wojnar"), Timothy Murphy ("Murphy"), Monica Migliorino ("Migliorino"), Project Life, and Operation Rescue.

Count V is brought by DWHO and Summit against only Vital-Med for breach of duty of confidentially.

This case was transferred to the undersigned by Executive Order dated November 8, 1994. On February 7, 1995, this court denied several sanctions motions and motions to reconsider the grant of leave to file a Third Amended Complaint. *NOW v. Scheidler*, 1995 WL 59228 (N.D. Ill. 1995).

Defendants now move to dismiss the Third Amended Complaint. [Docket numbers 768, 774, 776, 784, 787]. All motions are fully briefed and ripe for decision. Although the Defendants have filed separate motions and replies, the motions raise similar, though not identical, issues. To the extent possible, the court will address the various Defendants' arguments together. However, several of the arguments do not lend themselves to one coherent treatment.[3]

I. Res Judicata

Defendants make two res judicata arguments. First, they allege that NOW is barred from being a plaintiff under the Third Amended Complaint because it suffered a final dismissal of its claims under the Second Amended Complaint. Second, Wojnar argues that he has obtained a final dismissal of all claims alleged against him and, therefore, res judicata should protect him from having to further defend himself in this litigation.

Res judicata is a judicial doctrine designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). It is a "rule of fundamental and substantial justice," *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L. Ed. 1148 (1917); *Car Carriers*, 789 F.2d at 593, whose enforcement is essential to the maintenance of social order, "for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if . . . conclusiveness did not attend the judgments of such tribunals." *Alexander v. Chicago Park District*, 773 F.2d 850, 853 (7th Cir. 1985) (*quoting Nevada v. United States*, 463 U.S. 110, 129, 103 S. Ct. 2906, 2917-18, 77 L. Ed. 2d 509 (1983)).

[3] It appears that the Defendants have taken advantage of their status as co-defendants and allowed one group of defendants to "carry the torch" on each individual argument thereby saving the co-defendants' limited 15-page brief space for other arguments. To the extent possible, the court will identify the parties who concur or adopt their co- defendants' positions. However, this type identification is difficult, as some defendants have endorsed their co-defendants' arguments with a single sentence. The court has addressed all meritorious arguments made by the parties, and identifies the individual defendant proponents merely to ease the task of those who will undoubtedly review the record in the future.

Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. *Alexander*, 773 F.2d at 853; *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *see* Jack Friedenthal, Mary Kay Kane, Arthur Miller, *Civil Procedure* 610 (1993). As the Court of Appeals explained in *Alexander*:

> Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendants acts to bar any further claims by plaintiff against the defendant. It is usually referred to as res judicata. . . . Issue preclusion prevents relitigation of a matter of fact of law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n. 1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

Alexander, 773 F.2d at 853.

Res judicata promotes accuracy (leaving in place properly decided cases), efficiency ("it is in the interest of the state that there be an end to litigation"), and fairness ("no person should be twice vexed by the same claim"). Friedenthal, *et al.*, *Civil Procedure* 617 (1993), *see* Robert Ziff, Note, *For One Liti-*

gant's Sole Relief: Unforeseeable Preclusion and the Second Restatement, 77 Cornell L. Rev. 905, 910 (1992).

A. Legal Standard for Res Judicata

There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar.

The doctrine of res judicata is generally applied to a single "cause of action." The Court of Appeals in this circuit employs the "same transaction" test to define a "cause of action." *Car Carriers*, 789 F.2d at 593; *Alexander*, 773 F.2d at 854; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1241 (7th Cir. 1983). Under the same transaction test, a "cause of action" consists of a " 'single core of operative facts' which would give rise to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander*, 773 F.2d at 854). The "same transaction" test is fact-oriented, and provides that once a transaction has caused injury, all claims arising from that transaction must be brought in the same suit or be lost. *Car Carriers*, 789 F.2d at 593.

B. Applicability of Res Judicata to the Parties

1. NOW

Defendants Terry, Project Life, and Operation Rescue (hereinafter the "Terry Defendants") and Defendants Scheidler, Scholberg, Murphy, and PLAL (hereinafter the "Scheidler Defendants") argue that res judicata bars NOW, and only NOW, from bringing RICO claims against them. The Terry Defendants argue that NOW suffered a final, undisturbed judgment when the Second Amended Complaint was dismissed. They argue that in the Second Amended Complaint, NOW claimed injury only under the Sherman Act and that the dismissal of the Sherman Act claims was undisturbed by the Supreme Court. Accordingly, the Terry Defendants claim that res judicata bars NOW from asserting a new claim arising from the same set of

operative facts after a final decision on the merits of the original claim. Thus, they argue, under the "same transaction" test, NOW should be precluded from prosecuting the Third Amended Complaint.

The plaintiffs argue that NOW did allege RICO claims in the Second Amended Complaint, and that those claims remain viable after the Supreme Court's reversal of the prior orders of dismissal. Thus, the first task is to determine whether NOW was a plaintiff as to the RICO counts in the Second Amended Complaint. If the answer is yes and those counts were revived by the decision of the Supreme Court, res judicata is not applicable because there has been no final decision on the merits. This determination is made difficult by the fact that not every named plaintiff made claims against every named defendant in the Second Amended Complaint.

Before turning to the specific language relied upon by the parties, a description of the layout of the Second Amended Complaint is helpful. Paragraphs one through three are contained in a subsection of the complaint titled "NATURE OF THE ACTION." Paragraph four deals with jurisdiction. Paragraphs five through eight are captioned "PLAINTIFFS." Paragraphs nine through twenty appear under a "DEFENDANTS" heading. Paragraphs twenty-one through thirty-seven describe "CLASS ALLEGATIONS." Paragraphs thirty-eight through fifty-five are captioned "FORMATION OF THE PRO-LIFE ACTION NETWORK." Paragraphs fifty-six through sixty-three explain the "CARRYING OUT OF PLAN'S AGENDA: OPERATION RESCUE." Paragraphs sixty-four through seventy-eight appear under a "THEFT OF FETAL REMAINS" caption. Paragraph seventy-nine is the beginning of the actual substantive counts of the complaint; each count realleging the facts contained in the previous paragraphs. Over half the allegations in the complaint are not contained within a "count." This makes interpretation of the complaint difficult because, as will become clear, the complaint contains both specific allegations brought by specific defendants *as well as* general allegations

which, read alone, do not always make clear which plaintiff is making the assertion.

In the first paragraphs under the RICO counts subheadings (counts II, III, and IV) the Second Amended Complaint states that the counts were brought by "plaintiffs DWHO and Summit and the class they represent." (Second Am. Compl. §§ 94,[4] 106,[5] 111[6]). NOW takes the position that paragraphs one, three, twenty-two, 105, and 110 of the Second Amended Complaint support its conclusion that it was a RICO plaintiff in the Second Amended Complaint.

---

[4] Paragraph 94 alleges:

> Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR, and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

[5] Paragraph 106 provides:

> Count II is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

[6] Paragraph 111 alleges:

> Count IV is brought against the RICO defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105, and 107 through 110 above.

Paragraph one[7] outlines the law to be used to justify the relief sought: to obtain declaratory and injunctive relief. Paragraph one thus logically encompasses both the alleged RICO violations and the alleged Sherman Act violations (because both such allegations are made later in the complaint under specific counts) by stating "this is a civil action pursuant to . . . the Sherman Antitrust Act . . . [and] . . . RICO." Thus, paragraph one *does* identify NOW as a plaintiff, but not *necessarily* as a RICO plaintiff.

Paragraph three[8] is no more enlightening. This paragraph does not identify which count it refers to and does no more than explain that NOW believed it had organizational standing to sue under the Sherman Act (see *infra*). Nothing in the paragraph could be logically construed to support plaintiffs' allegation that NOW was a RICO plaintiff.

---

[7] Paragraph one provides:

> This is a civil action pursuant to section 16 of the Clayton Act, 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962; and state law. Plaintiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

[8] Paragraph three states:

> The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers.

Paragraph twenty-two,[9] though lengthy, provides no additional support for the plaintiffs' position. The paragraph appears under a "Class Allegations" subdivision of the complaint and tracks the requirements of organizational standing. *See infra* at 31. Indeed, the paragraph states that NOW wishes to represent the class in order to obtain declaratory and injunctive relief. That form of equitable relief was only requested under the Sherman Act count of the Second Amended Complaint.

---

[9] Paragraph twenty-two provides:

> Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interest NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law and fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Paragraph 105[10] is part of count II which alleges violations of RICO section 1962(a). The section 1962(a) count of the Second Amended Complaint was not reinstated by the Seventh Circuit or the Supreme Court. Count II states that it is brought "by plaintiffs DWHO and Summit and the class they represent . . ." (Second Am. Compl. § 94). However, paragraph 105 does plainly state that "the RICO Defendants' activities have injured the plaintiff class of female NOW members . . ." Paragraph 110[11] is part of count III, alleged under RICO section 1962(c), and incorporates the injuries in paragraph 105. Count III was also stated to have been brought by "plaintiffs DWHO and Summit and the class of clinics they represent . . ." (Second Am. Compl. § 106). Although the section 1962(a) claims in count II were not reinstated, count III (the section 1962(c) claim) was reinstated. By asserting that NOW and its members have been

---

[10] Paragraph 105 states:

> Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the rights to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.
>
> WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

[11] Paragraph 110 provides:

> As a result of each defendant's violation of 18 U.S.C. Section 1968(c) [sic], plaintiffs have suffered the injuries described *supra* in paragraphs 104-105. WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

injured by violation of section 1962(c), NOW asserted status as a RICO plaintiff. Although not specifically stating that it brought RICO claims in paragraphs 106 and 111, NOW did plead specific facts and injury sufficient to state a claim for relief under both sections 1962(c) and (d) because it alleged the conduct that violated the statute and that NOW was injured by that conduct. *See Luckett v. Rent-A- Center, Inc.*, 53 F.3d 871 (7th Cir. 1995); *La Porte County Republican Central Comm. et. al. v. Bd. of Comm'rs of County of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 422 (7th Cir. 1993); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992).

NOW did all that is required to state a claim under RICO section 1962(c) and (d) in the Second Amended Complaint; it stated that it had been injured because of the defendants' actions that violated RICO.[12] Therefore, NOW is not barred from making RICO allegations in the Third Amended Complaint because it made the same allegations, albeit less elaborately and eloquently, in the Second Amended Complaint. This interpretation gives a reasonable interpretation to both the allegations contained in paragraph 94 and 106 (which are alleged by DWHO and Summit) as well as paragraphs 105 and 110 (which include NOW as an injured party, and therefore as a party making a claim under the count). *See* Restatement (Second) Contracts § 203(a) (year) ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). NOW was a RICO plaintiff in the Second Amended Complaint, and it will be allowed to continue in that vein in the Third Amended Complaint.

---

[12] The Supreme Court's statement in *dicta* that "only DWHO and SWHO [Summit], and not NOW, have sued under RICO," *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 802, is not to the contrary.

2. Wojnar's Res Judicata Argument Against All Plaintiffs

Defendant Conrad Wojnar argues that res judicata operates to bar all Plaintiffs from bringing RICO claims against him. Wojnar claims that in the Second Amended Complaint he was charged only with violations of the Sherman Act antitrust count (count I) and under pendent state law. Because the dismissal of the Sherman Act claims was left undisturbed, Wojnar concludes that res judicata bars the prosecution of the Third Amended Complaint's RICO allegations, as to him.

Plaintiffs argue that because the preclusive effect of res judicata is only available where a final judgment has been entered, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S. Ct. 645, 649 n. 5, 58 L. Ed. 2d 552 (1979), the doctrine is not available to *Wojnar* because the dismissal was reversed. Furthermore, the Plaintiffs argue that because the *Wojnar* was a defendant as to a state law claim under the Second Amended Complaint, *Wojnar* has not suffered a final dismissal and therefore no final judgment has been issued against him.

The court will analyze Wojnar's res judicata argument using the standard set forth above of identity of parties, identity of causes of action, and finality of judgment. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982).

a. Identity of the Parties

The first prong in the analysis of whether res judicata applies is whether the parties in the first and second actions are identical. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The identity of the parties is not in dispute; the parties are identical for the purposes of this motion.

b. Identity of Causes of Action

The second prong of the analysis is whether the causes of action in the first and second actions are identical, under the "same transaction" test as defined by the Seventh Circuit. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee*

v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982). If the causes of action arise out of the "same transaction," the suits are identical for purposes of res judicata. *Id.* There is no serious contention that the claims against *Wojnar* in the Second Amended Complaint and those in the Third Amended Complaint do not arise from the same set of operative facts.

c. Final Judgment on the Merits

The third requirement for application of res judicata is that there have been a final judgment on the merits. It would appear that this requirement has been met, but Plaintiffs suggest otherwise. In count I of the Second Amended Complaint, Plaintiffs claimed that Wojnar violated the Sherman Act. The same conduct asserted to have violated the Sherman Act is now claimed to violate RICO. The Sherman Act count of the Second Amended Complaint was dismissed by the district court. *NOW v. Scheidler*, 765 F. Supp. at 937. That dismissal was affirmed by the Court of Appeals. *NOW v. Scheidler*, 968 F.2d at 612. It is not clear whether Plaintiffs included the dismissal of the Sherman Act count in their petition for certiorari to the Supreme Court, but it *is* clear that the Supreme Court did not grant certiorari on that issue. Thus, after the Supreme Court's decision in this case, the Court of Appeals reminded us that the Sherman Act claims were dismissed. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Thus, it would seem, there has been a final judgment for res judicata purposes. Alas, nothing in this case is that simple.

Included in the Second Amended Complaint was also count V against Wojnar alleging "tortious interference with prospective economic advantage" under state law.[13] It was alleged that the district court had supplemental jurisdiction over that and other state law counts. After the remand from the Supreme Court, the Court of Appeals stated that "counts five, six, seven, which allege violations of state law, survive as well pursuant to

[13] Wojnar was named as a defendant in only counts I and V of the Second Amended Complaint.

the district court's supplemental jurisdiction. See 28 U.S.C. § 1367." *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Plaintiffs seize upon that language to argue that if the state law claims survive and this court retains jurisdiction over them, then there could not have been a final judgment on the merits for res judicata purposes. There are several things wrong with Plaintiff's position: First, the quoted statement by the Court of Appeals is *dicta*; second, once the order of dismissal of Count I became final, this court ceased to have jurisdiction over count V of the Second Amended Complaint; and third, Plaintiffs misconstrue the operation of res judicata in this circumstance. Count I of the Second Amended Complaint stated a claim as to which this court had federal question jurisdiction. Count V stated a claim as to which this court had supplemental jurisdiction because of its relationship to the issues raised in count I; what was previously called "pendent claim" jurisdiction. *Finley v. United States*, 490 U.S. 545, 548, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909)). Count I was dismissed because the district court concluded that the Sherman Act was not applicable to the conduct alleged in the Second Amended Complaint. Res judicata should bar the Plaintiffs from now amending the complaint to allege a new (RICO) theory in connection with the same alleged conduct without regard to whether there remain unresolved state law claims. A brief example demonstrates why this is so. If the allegations against Wojnar contained in count V had been made in a separate state complaint rather than in the same (federal) complaint as count V, and the federal claim had been dismissed, there is no logical reason why res judicata should not bar Plaintiffs from filing a new federal complaint asserting a different (federal) legal theory as to Wojnar, but based upon the same operative facts. In the example, the existence of the state claim is irrelevant to the question of whether res judicata should apply to the federal claim.

Plaintiffs claims against Wojnar are barred by res judicata and will be dismissed.

II. Supplemental, Ancillary, or Pendent Jurisdiction Over Vital-Med

Vital-Med alleges that its motion to dismiss should be granted because although there was a basis for federal jurisdiction under the Second Amended Complaint, there is no such basis under the Third Amended Complaint. In the Second Amended Complaint, Vital-Med was a defendant under count I (Sherman Anti-Trust Act) and count VII (breach of a duty of confidentiality allegedly owed to DWHO and Summit). Count I was dismissed by the district court, affirmed by the Court of Appeals, and not considered by the Supreme Court. The Third Amended Complaint names Vital-Med as a defendant only in count V alleging a breach of a duty of confidentiality owed to DWHO and Summit. Vital-Med contends this court should dismiss count V of the Third Amended complaint because there is no federal question or diversity jurisdiction, and the court has no basis for exercising supplemental, pendent, or ancillary jurisdiction pursuant to 28 U.S.C. § 1367(a) ("Section 1367").

Plaintiffs contend that this court has supplemental jurisdiction over Vital-Med because federal jurisdiction was never lacking, and therefore the pendent state law claim under which Vital-Med is sued in the Third Amended Complaint is proper pursuant to 28 U.S.C. § 1367. Vital-Med contends that section 1367 does not apply to this case because it was commenced before the statute's effective date.

As the only claim against Vital-Med is stated under state law, it is clear that claim is not supplemental to any federal claim. *Cf.* 28 U.S.C. § 1367(a).

A. Applicability of 28 U.S.C. § 1367

By its own terms, section 1367 provides for supplemental jurisdiction in the federal courts "[and] *shall apply to civil actions commenced on or after* the date of the enactment of this Act. [Dec. 1, 1990]." 28 U.S.C. § 1367 note (1990) (emphasis added). Section 1367 provides that once a district court has

original jurisdiction over one claim in any civil action, that same court may adjudicate "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

This case was originally filed on October 17, 1986. An amended complaint was filed on February 3, 1989. [Docket number 155]. The Second Amended Complaint was filed on September 25, 1989. [Docket number 236]. Vital-Med was first named as a defendant in the Second Amended Complaint, in 1989. Vital-Med contends that, for section 1367 purposes, the case against them was filed in either 1986 or 1989, and therefore the statute does not apply to them. Thus, Vital-Med maintains that the court should look to pre-1990 law to determine whether it has jurisdiction over it and count V.

The Plaintiffs disagree, relying upon the opinion of the Court of Appeals that "[c]ounts five, six, and seven, which allege violations of state law, survive . . . pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367." *NOW v. Scheidler*, No. 91-2468, 25 F.3d 1053, 1994 WL 196761 (7th Cir. May 16, 1994). Plaintiffs argue that because the Court of Appeals relied on section 1367, at least in part, in reinstating the state law count against Vital-Med, that this court should allow the claim to survive.[14]

This case has been in existence since 1986, and Vital-Med has been a defendant since 1989. No matter which date is the

---

[14] The law of the case might come into play here, as the Seventh Circuit relied, with the intermediary signal "*see*" on section 1367. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994); *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993). However, this court need not follow the letter of the Seventh Circuit's ruling and assume, without analysis, that section 1367 applies because of the "*see*" signal. *A Uniform System of Citation* 23 (15th ed. 1991). The Court of Appeals was not relying directly on section 1367, rather, it was directing the reader's attention to the statute to show the general legal theory supporting its conclusion that the counts were to be reinstated. *See id.*

date on which the action was "commenced" for purposes of section 1367, both are before December 1, 1990, which is the date after which, by its own terms, section 1367 "*shall apply to civil actions commenced* [thereafter]." Therefore, section 1367 does not apply, and the court must look to the law of supplemental jurisdiction as it existed before section 1367 was enacted.

B. History of Supplemental Jurisdiction

In contrast to state courts, federal courts are forums of limited jurisdiction, possessing only the power to hear those cases enumerated in Article III of the United States Constitution and only to the extent authorized by Congress. U.S. Const. Art. III § 2; Friedenthal, *et al.*, Civil Procedure 64 (1992). It is fundamental that "as regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, . . . [t]he Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . [t]o the extent that such action is not taken, the power lies dormant." *Finley v. United States*, 490 U.S. 545, 547, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (quoting *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252, 18 L. Ed. 851 (1868)). Originally, this meant that federal courts could not exercise jurisdiction over non-federal claims or issues that were closely related to federal claims. However, federal judges managed to accommodate the need to exercise jurisdiction over non-federal claims, and two forms of federal jurisdiction developed, ancillary and pendent jurisdiction. Friedenthal, *et al.*, Civil Procedure 64 (1992).

Originally, ancillary jurisdiction was used to allow federal courts to adjudicate claims to property where the ownership of that property was otherwise properly being litigated in federal court. *Freeman v. Howe*, 65 U.S. (24 How.) 450, 16 L. Ed. 749 (1860); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984). Before 28 U.S.C. § 1367 was enacted, the Federal Rules of Civil Procedure used a "transaction and occurrence" standard for compulsory counterclaims and cross-claims, thereby allowing ancillary jurisdiction over these

claims. 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984).

Pendent jurisdiction was developed by the Supreme Court in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824), when Justice Marshall declared that a federal court of original jurisdiction should have the power to decide all the questions that a case presented and the court needed to decide in order to function effectively. *Osborn*, 22 U.S. (9 Wheat.) at 823. As the doctrine matured, pendent jurisdiction was most commonly exercised when a plaintiff brought a federal question claim and sought to have a related state law claim against the same defendant adjudicated before the federal court. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) (Jones Act claim provides pendent jurisdiction for maritime claim that, by itself, could only be asserted on the admiralty side of federal court.). This was called "pendent claim" jurisdiction.

"Pendent party" jurisdiction was "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 550-51, 109 S. Ct. 2003, 2007-08, 104 L. Ed. 2d 593 (1989). *Finley* expressly stated that where federal courts were asked to assert pendent party jurisdiction, "as opposed to the addition of only claims, we will not assume that the full congressional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Finley*, 490 U.S. at 549, 109 S. Ct. at 2007. Thus, pendent party jurisdiction is generally not available unless the statute expressly authorizes it. *See id.* "Pendent claim" jurisdiction, by contrast, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S. Const. Art. III. § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *see also Finley*, 490 U.S. at 563-64, 109 S. Ct. at 2015 (Stevens, J., dissenting).

1. Application to Vital-Med

Plaintiffs contend that the issue before the court is whether Count V against Vital-Med is a proper pendent *claim,* while Vital-Med argues that the issue is whether the court has pendent *party* jurisdiction.

It is clear from the description of the various types of supplemental jurisdiction that existed prior to the enactment of section 1367 that any jurisdiction over plaintiffs' claim against Vital-Med depends upon an assertion of pendent *party* jurisdiction. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976) (plaintiff was unable to bring state law claims against a completely new party although the claims arose out of the same transaction and occurrence which gave rise to the plaintiff's federal claims). Vital-Med is not a defendant under any of the federal counts in the Third Amended Complaint. Plaintiffs have not asserted that Vital-Med is diverse from the plaintiffs.

Therefore, the court will grant Vital-Med's motion to dismiss count V of the Third Amended Complaint and Vital-Med as a defendant for lack of jurisdiction.[15] *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007- 08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976); *see also Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 608-09 (S.D. Fla. 1991) (following *Finley* and dismissing a non-diverse, non-federal claim defendant in a case brought before section 1367 was enacted).

2. Application to Wojnar

As stated above, any attempt to assert a new (RICO) claim against Wojnar is barred by res judicata. Therefore all that is left are the state law claims against him. These claims can only be pendent party claims and the reasoning applicable to Vital-Med are equally applicable to Wojnar. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *United Mine Work-*

---

[15] Vital-Med's argument regarding the inapplicability of the doctor-patient privilege to their relationship with the plaintiff clinics is therefore moot.

ers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The state law claims against Wojnar will also be dismissed. *Id.* The court now turns to the merits of the motions to dismiss for failure to state a claim.

III. Failure to State A Claim

The Defendants allege various theories why the Third Amended Complaint fails to state a claim upon which relief may be granted. Defendants argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the complaint does not state a cause of action upon which relief may be granted. *Corcoran v. Chicago Park Dist.*, 875 F.2d 609, 611 (7th Cir. 1989). The facts as alleged below are viewed in the light most favorable to the Plaintiffs for the purpose of determining the Defendants' motions to dismiss. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). Unless it appears beyond doubt that Plaintiffs can prove no facts which would entitle them to relief, the Court must deny the motion. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 419 (7th Cir.), *cert. denied,* 510 U.S. 932, 114 S. Ct. 346, 126 L. Ed. 2d 310 (1993). However, the court need not strain to find inferences favorable to Plaintiffs which are not apparent on the face of the complaint. *Coates v. Illinois St. Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir. 1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991).

The factual allegations of this case will be outlined generally. Plaintiff NOW is a nationwide, non-profit organization dedicated to "advancing and protecting the legal rights of women." (Complaint § 7). DWHO is a Florida corporation with its principal place of business in Delaware. (Complaint § 8). Summit is a partnership with its principal place of business in Delaware. (Complaint § 9). Plaintiffs allege that all the de-

fendants except Vital-Med[16] are involved in an "enterprise," as defined in 18 U.S.C. § 1961(4). This enterprise, called the Pro-Life Action Network ("PLAN") engages in or affects interstate commerce. According to the complaint, PLAN's common purpose is to use racketeering activity to drive out of business all clinics that provide abortion services. PLAN's activities are distinct from the pattern of racketeering activity engaged in by each defendant.

Defendants Scheidler, Terry, Scholberg, Murphy, Migliorino, Wojnar[17] and the Pro-Life Action League ("PLAL") are each persons under 18 U.S.C. § 1961(3), and are associated with PLAN by virtue of their involvement with its annual conventions as speakers and in other leadership capacities. No later than 1987, Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). Migliorino has been a featured speaker at one or more PLAN conventions. (Complaint § 16). Scheidler, Scholberg, Wojnar, Murphy, PLAL, and Vital-Med are residents of Illinois. (Complaint §§ 11, 13, 14, 15, 17, 18). Migliorino is a Wisconsin resident. (Complaint § 16). Terry and Project Life are New York residents. (Complaint §§ 12, 20). Defendants PLAL, Operation Rescue ("OR") and Project Life are each persons under the RICO statute, are associated with PLAN, and participate in PLAN by being its member groups. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit, and their affiliated clinics. (Complaint § 17).

PLAL's business consists of using racketeering activity to disrupt clinics that perform abortions. (Complaint § 18). Scheidler has been the director of PLAL. (Complaint § 11). Scholberg was the assistant director of PLAL from February, 1988 until approximately 1990. (Complaint § 13). Murphy has

---

[16] Vital-Med will be dismissed from this case pursuant to this memorandum opinion.

[17] Wojnar will be dismissed from this case pursuant to this memorandum opinion.

been a paid employee of PLAL since September, 1988, and he worked as a volunteer for PLAL before that date. (Complaint § 15). Terry has been the executive director of Project Life and was the national organizer of Operation Rescue. (Complaint § 12).

OR's business consists of using racketeering activity to disrupt and close clinics that perform abortions. OR has, through Terry and other agents and co-conspirators, engaged in racketeering activity within this district. (Complaint § 19).

Project Life has engaged in racketeering activity in this district through PLAN, Terry, and other agents and co-conspirators. (Complaint § 20).

Plaintiffs allege that the Defendants committed the following predicate acts of racketeering, including acts and/or threats of: (1) extortion against clinic personnel, patients, and suppliers of goods; (2) murder of clinic personnel, including doctors and their families; (3) kidnaping of clinic personnel, including doctors and their families; and (4) arson of clinics that provide abortion services; (4) [sic] taking possession of interstate shipments of fetal remains with intent to convert the remains to their own uses; (5) obstruction of interstate commerce by extortion and/or threats to commit extortion and/or the commission or threat of physical violence to persons and property; and (6) travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, or facilitate the promotion, management, establishment of extortion or arson. (Complaint § 2).

A. Proximate Cause and Standing

1. Standing

a. DWHO and Summit

The Terry Defendants allege that DWHO and Summit lack the necessary "proximate causation" and standing to bring both 18 U.S.C. § 1962(c) ("substantive RICO") and (d) ("RICO conspiracy") charges against them.

The plaintiff clinics argue that in addition to defendants' conduct at the plaintiff clinics the Defendants' "threats and acts of nationwide violence" satisfy the requirements of standing and proximate cause for the substantive RICO and RICO conspiracy claims. Defendants maintain that Plaintiffs' allegations regarding "illegal anti-abortion activities elsewhere [at clinics other than DWHO and Summit]" are insufficient to show proximate cause.

RICO's standing provision for civil cases, 18 U.S.C. § 1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Thus, to have standing to assert claims for either substantive RICO or RICO conspiracy violations, a plaintiff must be injured in her "business or property" due to the violation.

The seminal case on RICO standing and proximate causation is *Holmes v. S.I.P.C.* There, the Supreme Court concluded that under § 1964(c), the plaintiff need not be *directly* injured by the defendants. Rather, common law principles of proximate cause apply. *Holmes v. S.I.P.C.*, 503 U.S. 258, 268- 70, 112 S. Ct. 1311, 1318, 117 L. Ed. 2d 532 (1992). The requirement that there be proximate cause bars a plaintiff from recovering where her injury flowed "merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* (citing 1 J. Sutherland, *Law of Damages* 55-58 (1882)). In *Holmes*, the Supreme Court concluded that plaintiff Securities Investor Protector Corporation ("SIPC") did not have standing to sue a broker-dealer under RICO despite SIPC's claim that it had the subrogated rights of the broker-dealer's customers because the link between the alleged stock manipulation which caused the injury and losses to the nonpurchasing customers was too contingent on the broker-dealer's inability to pay the claims and was therefore too remote to be the proximate cause of the customers' injuries.

However, in this case, the Supreme Court has already noted that the Second Amended Complaint made sufficient allegations to confer standing. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The plaintiff clinics alleged in the Second Amended Complaint that (1) the defendants conspired to use force to induce clinics staff and patients to stop working and obtaining services elsewhere; and (2) that the conspiracy injured the business and/or property interests of the plaintiffs. *Id.* The Court stated that in light of the limited requirement that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific allegations that are necessary to support the claim," *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992).), "nothing more is needed to confer standing . . . at the pleading stage." *Id.*

The following allegations are set forth as examples that show injury to the Plaintiffs and that have been connected to each of the specific defendants:

1. Attempted and actual extortion committed by Scheidler on April 11, 1986 when he threatened DWHO's clinic administrator with "reprisals" if she refused to quit her job at the clinic. (Complaint § G). [This allegedly harmed DWHO because it caused the clinic to lose personnel and be forced to retrain a new administrator. It allegedly harmed NOW's members because it hampered their ability to transact business with the clinic, and may have increased the cost of obtaining DWHO's services.]

2. Attempts, conspiracies to commit and the commission of extortion and/or physical violence by Operation Rescue when it organized a "National Day of Rescue" on October 29, 1988, and blocked access to clinics in forty cities and attempted to force the clinics to close. (Complaint § I(4)). [This allegedly harmed the plaintiffs because, reading the complaint in the light most favorable to the plaintiffs, the activities surrounding the National Day of Rescue was committed against both Summit and DWHO. This, in turn, caused the plaintiff clinics to lose

business that day, and NOW's members to be unable to transact business with the target clinics on that day.]

3. Attempts, conspiracies to commit and the commission of extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL and "others" against DWHO and Summit by conspiring to steal, stealing, and hiding interstate shipments of fetal specimens. (Complaint § J(1)). [This harmed both DWHO and Summit by interfering with their business relations with Vital-Med.]

4. Scheidler, Murphy, PLAL, and "others" threatened to disclose private information about the patients of the plaintiff clinics in connection with the theft of the fetal remains. This was done in order to interfere with the actual or prospective business relations with the plaintiff clinics. (Complaint § J(2)). [The clinics argue that Defendants' actions harmed their business relationship with potential and current patients because the patients' confidential medical information could be revealed by Defendants.]

5. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and "others" against doctors working with "clinics affiliated with DWHO and Summit" by disclosing the names of the doctors who worked at the clinics. Defendants disclosed those names to induce fear in the doctors and force them (and the clinics who employed them) to forego the economic benefits of their business relations. (Complaint §§ 87(K)-87(L)). [The clinics argue that this disclosure harmed the clinics business, and NOW's ability to transact business with the clinics and the doctors practicing at those clinics.]

6. Migliorino forced Summit's new lessor to breach its lease with the clinic by threatening to disrupt and harass the other tenants if Summit were allowed to move into the building. (Complaint §§ 80-81). [This harmed Summit by having to incur the expense of finding a new location and, Plaintiffs allege, increased rental costs.]

7. Migliorino, Murphy, Wojnar, and Scheidler have used the telephone and mail to intimidate and harass clinics in at least six states. (Complaint § 35). [Causing harm to the target clinics

(DWHO and Summit are not alleged to be targets of this activity) by violating the Hobbs Act and causing intimidation and harassment as well as increasing staff turnover, and increasing costs by requiring higher salaries to keep staff at the plaintiff clinics].

8. Terry was the executive director of Project Life and was the national organizer of Operation Rescue. Terry also served on the leadership council of PLAN and conspired with others in PLAN to close clinics through force and violence. (Complaint § 12). Operation Rescue and Project Life, in turn, executed over on hundred violent blockades of clinics that performed abortions. Terry participated in these blockades. (See Complaint §§ 60- 66). [This harmed the target clinics by interfering with their business relationships with patients and employees. Plaintiffs also argue that the blockades force the target clinics to give up property rights. None of these blockades were alleged to have occurred at the plaintiff clinics' premises. However, the conspiracy to close clinics through violence could arguably affected the plaintiffs because they are clinics that perform abortions and are therefore in the class of clinics targeted by PLAN.]

9. Scholberg conspired with others at PLAN conferences and "mini-conferences" to close clinics through force and violence and participated in several violent clinic blockades (at several of which Scholberg was arrested), although none of the blockades were at either of the plaintiff clinics. (Complaint §§ 53, 55, 58). [Plaintiffs allegedly were injured by Scholberg's participation in the planning and conspiring to close clinics through force and violence.]

Thus, the allegations under the Third Amended Complaint alleges sufficient facts to satisfy general standing requirements, which is all that is required at the pleading stage. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136 (1992); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206- 07, 45 L. Ed. 2d 343 (1975).

b. NOW

NOW presents a special standing problem. The Scheidler Defendants allege that NOW lacks organizational standing to bring the claims under the Third Amended Complaint. Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 600 (7th Cir. 1993). However, in certain circumstances, an association may have standing solely as the representative of its members. *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 600; *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 n. 3 (7th Cir. 1987) (citing cases). The landmark case for associational, or organizational, standing is *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The *Hunt* test is as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S. Ct. at 2441. Nonetheless, the possibility of representational standing does not "eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *see Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). The *Hunt* test was recently reaffirmed in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. *Brock*, 477 U.S. at 289, 106 S. Ct. at 2532. The Court continued, "[a] preexisting organization

can often draw upon a preexisting reservoir of experience, research, and capital. These resources . . . can often sharpen the presentation of issues appreciably – one of the primary concerns of the doctrine of standing." *Retired Chicago Police Ass'n*, 7 F.3d at 600 (citing *Brock*); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S. Ct. 624, 656, 95 L. Ed. 817 (1951) (Jackson, J., concurring).

The first prong of the *Hunt* test is the ability of the members of the association to sue in their own right for the alleged injury. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. The Scheidler Defendants maintain, without citing authority, that NOW does not meet the first prong of this test because "only those NOW members injured in their 'business or property' would have standing to sue under RICO." Plaintiffs argue, however, that "the [Third Amended] Complaint has alleged direct inference with NOW members' business and property rights sufficient to meet the first *Hunt* element. *See* §§ 4, 5; *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992)". (Response p. 20 n. 6).

This court has been given some guidance from the Supreme Court in its opinion reversing the dismissal of this case. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The Court emphasized that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992). The Court concluded that DWHO and Summit had claimed sufficient injury to their business and/or property interests to confer standing on both of the clinics. *Id.* However, alleging injury is not enough; RICO requires the complaining party to have been "injured [in her] business and/or property interests" in order to establish standing. 18 U.S.C. § 1964(c). Mindful of Congress' broad remedial purposes in enacting RICO, courts have interpreted the phrase "business or property" to mean only commercial interests, as distinct from personal interests such as pain and emotional suffering. *See, e.g., Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992) (value of client's sexual activity, allegedly performed

for attorney to pay legal fees incurred in divorce proceeding was not "business or property" for purposes of RICO); *Rylewicz v. Beaton Svcs.*, 888 F.2d 1175, 1180 (7th Cir. 1989) (the terms "business or property" are words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783 (9th Cir. 1992) (personal injuries, such as diminution of enjoyment of apartment suffered by tenant as result of alleged drug racketeering in neighboring apartment, not compensable under RICO); *Van Schaick v. Church of Scientology of Cal. Inc.*, 535 F. Supp. 1125, 1137 (D.Mass.1982); *Savastano v. Thompson Medical Co.*, 640 F. Supp. 1081, 1087 (S.D.N Y.1986).

The Supreme Court has focused this court's interpretation of the "business or property" language. The Court found standing under the Second Amended Complaint because of allegations that the Defendants "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803.

The Third Amended Complaint alleges that NOW's members have been harmed by the Defendants' blockades, threats, and destruction because women members are unable to avail themselves of a commercial relationship; the ability to transact business with the clinics. This type of injury does indeed implicate the right to transact legal business. Moreover, this type of injury is clearly *not* the kind of injury for which courts have barred recovery under RICO – it is not a "personal" injury such as pain, suffering, or humiliation. Therefore, NOW's women members would have a right to sue in their own capacities. Thus, the first prong of the *Hunt* test is satisfied.

The second prong of the *Hunt* test is whether the interests that the organization seeks to protect or enforce are germane to the organization's purpose. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. NOW's organizational purpose is "advancing and protecting the legal rights of women." The Defendants contend that because

NOW's purpose is not abortion-specific, it may not maintain standing to prosecute this suit. Plaintiffs maintain, however, that NOW seeks to ensure reproductive freedom, which it contends is "unquestionably germane" to NOW's organizational purpose. Plaintiffs argue, moreover, that it is not necessary that the organization's sole purpose relate to the issue being litigated. Plaintiffs are correct. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441 (interests sought to be protected must be "germane to the organization's purpose"); *Brock*, 477 U.S. at 287, 106 S. Ct. at 2531 (same, *quoting Hunt*). Ensuring the right to abortions is a germane interest to NOW's purpose of protecting the legal rights of women. The fact that some do not share NOW's view that ensuring access to abortion services advances and protects the legal rights of women does not diminish the existence of the right or the validity of NOW's interpretation of its goals. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990). To the extent that the Third Amended Complaint alleges that that legal right is or has been hampered or threatened by Defendants, it conforms with NOW's purpose of protecting women's rights sufficiently to meet the second prong of the *Hunt* test.

The final prong of the *Hunt* test is whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. Defendants contend that NOW cannot satisfy this prong of the test because individual members will have to participate in the suit to prove the damages that they actually suffered. Plaintiffs argue that individual members will not have to participate in the suit because NOW does not seek damages under the Third

Amended Complaint, rather, it seeks injunctive relief for its members. Therefore, NOW argues, there is no need for individual participation in the suit.

NOW sues only for injunctive relief. The only potential recipients of treble damages would be DWHO, Summit, and any possible class of clinics that they might represent. Thus, there would be no need for individual NOW members to establish pecuniary loss. NOW need only show, at the pleading stage, that some members would benefit from the injunctive relief requested. *Warth v. Seldin*, 422 U.S. at 515, 95 S. Ct. at 2213 ("the remedy, if granted, will inure to the benefit of those members of the association actually injured"); *Brock*, 477 U.S. at 288, 106 S. Ct. at 2531-32; *Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d at 601. It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate *Hunt's* third prong. NOW has standing to sue as an association.

2. Requirement of Predicate Act as Proximate Cause

Defendants contend that even if there is standing and general proximate cause, Plaintiffs should not be allowed to prosecute this case because their injuries do not arise out of predicate acts under RICO. Plaintiffs contend that the injuries need not arise out of predicate acts, as long as the injuries arise out of acts in furtherance of the conspiracy.

The RICO statute prohibits persons engaged in an interstate "enterprise" from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" means either any act or threat of violation of several, enumerated felonious state crimes or any act which is punishable under several enumerated federal statutes. 18 U.S.C. § 1961(1). These enumerated activities are called "predicate acts." The "pattern" requirement is satisfied if the defendant commits at least two predicate acts within a ten year period (excluding any time spent in prison). 18 U.S.C. § 1961(5).

The circuits are split on the issue of whether a predicate act must be the proximate cause of the injury. The Seventh Circuit is in the group that does not require that the injury flow from a predicate act.[18] *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989) (injury from overt act that furthers RICO conspiracy is sufficient to confer standing, even if overt act is not a predicate act of racketeering); *see Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 112 S. Ct. 332, 116 L. Ed. 2d 272 (1991) (White, J. dissenting from denial of certiorari) (noting split in the circuits). This Circuit adopted the *Shearin* approach in *Schiffels* and stated that there is no need to show the injury to the plaintiff arose out of a "predicate act" as long as it arose from an "overt act" in furtherance of a RICO conspiracy, thereby being injured "by reason of" the conspiracy. *Schiffels*, 978 F.2d at 349. Schiffels had RICO standing where she sued her employer under the theory that "the defendants [employer] conspired to violate § 1962(c) by conducting the affairs of an enterprise – the Kemper Plan – through a pattern of mail fraud. The defendants harassed and eventually fired her, she says, to further the conspiracy by keeping her from reveal-

---

[18] *Cf.* Cases in which RICO standing was denied are generally those in which an employee-plaintiff did not allege a sufficient nexus between the alleged predicate acts committed by the employer and her termination. *See, e.g., Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990) (plaintiff who raised RICO charges in a wrongful discharge suit lacked standing under RICO because the plaintiff was the victim of an alleged wrongful discharge and not of any predicate act under RICO); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990) (plaintiff who alleged wrongful discharge after reporting the employer's scheme to ship defective products lacked standing to assert a RICO claim because the predicate acts of racketeering were not the cause of the alleged injury); *Flinders v. Datasec Corp.*, 742 F. Supp. 929 (E.D. Va. 1990) (plaintiff who was terminated after threatening to expose a kickback scheme lacked standing because his termination was not an injury caused by the racketeering acts). Obviously, these cases are distinguishable based on subject matter of the dispute. However, this court need not go through that analysis because the Seventh Circuit has adopted an alternative approach.

ing the fraudulent scheme." *Schiffels*, 978 F.2d at 351. The Court noted that finding standing in this context would not open the floodgates to many potentially frivolous suits because the common law principle of proximate cause will still provide a limit on standing to sue under RICO. *Schiffels*, 978 F.2d at 350 (citing *Holmes*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)).

In light of the foregoing, the plaintiffs have standing to sue for RICO conspiracy if they alleged that their injuries arose out of one or more "overt acts" in furtherance of PLAN thereby being injured "by reason of" the conspiracy. *See Schiffels*, 978 F.2d at 349. It is also unnecessary to decide which of the alleged conduct would constitute predicate acts – all that is necessary is that the conduct was done in furtherance of the enterprise. *Id.*

Defendants have argued that the complaint fails to allege the existence of a RICO conspiracy under section 1962(d) with sufficient specificity. However, Fed. R. Civ. P. 8(a)(2) merely requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Each count of the complaint should contain such a statement. There are heightened pleading requirements for pleading fraud which are contained in Fed. R. Civ. P. 9, but they apply *only* to cases alleging fraud. "Rule 9(b) applies only to fraud or mistake, not to conspiracy. [A] pleading of conspiracy, apart from the underlying acts of fraud, is properly measured under the more liberal pleading requirements of Rule 8(a). Even so, the complaint must allege some factual basis for a finding of a conscious agreement among the defendants." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4 (2d Cir. 1990); *see also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1372 (D.Conn.1987). The requirements for pleading a RICO conspiracy are measured by the liberal pleading requirements of Fed. R. Civ. P. 8(a). *Farberware v. Groben*, 1992 WL 80722 (S.D.N.Y.1992). It is inappropriate to dismiss a complaint without allowing the plaintiffs the opportunity to

discover whether, in fact, their injuries resulted from the defendants actions. The court is uncomfortably aware that this is a nine-year old case, in which some discovery has been completed. However, a Third Amended Complaint is before the court today. The age of the case does not change the liberal pleading requirements of Rule 8. As discussed above, both DWHO and Summit have pled that the defendants have conspired at PLAN meetings to (violently) close clinics that provide abortion services, and deprive NOW's women members the opportunity to avail themselves of those services. That is all that is required at this time to state a claim of a RICO conspiracy.

Finally, Defendants Terry, Operation Rescue, and Project Life all contend that no specific allegations of predicate acts are made against them and that therefore they should be dismissed from this case. This argument misconstrues the concept of *conspiracy*. Terry is alleged to be a conspirator in the PLAN enterprise, and thus, although there are no allegations that he committed any substantive acts against the plaintiffs in his own right, he may still be held liable for *conspiring* with the other defendants. That satisfies proximate cause for the § 1962(d) conspiracy. Operation Rescue is a member of PLAN and is alleged to have orchestrated the "National Day of Rescue" which affected the plaintiff clinics individually and to have made "class-wide threats of force and violence against all clinics [that provide abortion services]." Operation Rescue has therefore allegedly committed predicate acts against DWHO, Summit and NOW. The status of Project Life is more difficult. Project Life is alleged to have organized "massive blockades" and "clinic invasions" which were designed to block access to the clinics to prevent patients and staff from entering or leaving the facility and to create a threatening and intimidating atmosphere and a public image of danger at the clinics – thereby violating "substantive RICO" under § 1962(c). (Complaint § 59). This is alleged to violate the Hobbs Act, which is a predicate act under RICO. Project Life is alleged to have participated

in many of PLAN's annual conferences.[19] Although this is not a predicate act per se, it does connect Project with PLAN and could give rise to conspiracy liability under § 1962(d). *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (RICO conspiracy law, like traditional conspiracy law, requires only that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy's purpose.); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146 (D.N.J.1983) (Congress specifically provided that a conspiracy to violate substantive RICO offenses is itself a violation intended to establish separate conspiracy offense distinct from substantive offenses.), *aff'd in part, rev'd in part,* 742 F.2d 786 (2d Cir. 1984) (Defendants must knowingly agree to further the affairs of the enterprise to be liable under RICO), *cert. denied,* 469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985). Thus,

---

[19] The word "participate" has given this court some difficulty. Although 18 U.S.C. § 1962(c) prohibits "conduct[ing] or particip[ation] directly or indirectly, in the conduct of [a RICO] enterprise's affairs," the term is, in the linguistic sense, broad. Webster's Third New International Dictionary 1646 (1976) ("participate" means "to take part in something, usually in common with others"). However, the Supreme Court recently interpreted the phrase and concluded that "participate" requires some "element of direction." *Reves v. Ernst & Young*, 507 U.S. 170, ---, 113 S. Ct. 1163, 1169-70, 122 L. Ed. 2d 525 (1993). The Supreme Court adopted the "operation and management" test established by the Eighth Circuit in *Bennett v. Berg*, 710 F.2d 1361, 1364 (en banc), *cert denied sub nom. Prudential Ins. Co. of America v. Bennett*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983). *Reves*, 507 U.S. at ---, 113 S. Ct. at 1169-70. It is unnecessary (and impossible) for this court to analyze now whether any of the defendants' conduct rises to the level of "operation and management" of PLAN. Plaintiffs have pled that the defendants "participated" in PLAN which this court will interpret as meaning "operate or managed" in light of *Reves*. Nothing more need be pled at this time to overcome these motions to dismiss. Nonetheless, plaintiffs are reminded that they will eventually have to prove facts which shows each of the remaining defendants did something more than attended PLAN meetings and/or endorsed its positions.

all three of the Terry Defendants have been adequately bound in this complaint under either a direct predicate act or a conspiracy theory of liability under section 1962(d).

B. Pleading Deficiencies

Defendants have alleged several pleading deficiencies in the Third Amended Complaint: (1) whether the violations of the Hobbs Act are well-pled; (2) whether a RICO conspiracy has been pled under § 1962(d); (3) whether a violation of § 1962(c) has been pled.

1. Hobbs Act

On remand, the Seventh Circuit directed this court to address whether the Defendants' actions violated the Hobbs Act. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. The Defendants come at this question from two different angles. First, the Terry Defendants contend that there simply are insufficient facts alleged upon which this court could grant relief because the Complaint fails to allege that Defendants obtained property from the Plaintiffs. Second, the Scheidler Defendants state that the Plaintiffs' reading of the Hobbs Act is too broad based upon the basic language of the statute, and the acts alleged as violating the Act simply do not state a violation. Essentially, however, both sets of defendants make the same argument: that their actions did not violate the Hobbs Act. Plaintiffs argue that the Hobbs Act predicate acts are well-pled; that there is no need to allege that the property that they lost wound up in the Defendants' hands.

The Hobbs Act is violated by anyone who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to violate [this section] . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The elements of a Hobbs Act violation are: the defendants (1) induce their victims to part with property; (2) through the use of fear; (3) with an adverse effect on interstate commerce. *United States v. Local 560 of Int'l Brotherhood of Teamsters,* 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *see* Harold Brown, *Civil RICO Practice: Causes of Action* 314 (1991); Carole Golinski, *In Protest of NOW v. Scheidler*, 46 Ala. L. Rev. 163, n.134 and accompanying text (1994).

The definition of "property" under the Hobbs Act is expansive. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990). The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252 (1960). "In a broad sense, [property includes] any valuable right considered as a source or element of wealth, including 'a right to solicit business.'" *Town of West Hartford*, 915 F.2d at 101 (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021, 90 S. Ct. 1258, 1262, 25 L. Ed. 2d 530 (1970), and citing *Northeast Women's Center*, 868 F.2d at 1350). The property affected may be either tangible or intangible, such as the right to conduct business. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), for the proposition that the Hobbs Act extends to protect intangible as well as tangible property). The right to pursue a lawful business has likewise been protected. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969).

Indeed, the Seventh Circuit noted earlier in this case that "[t]he Hobbs Act . . . does not require that the Defendant profit economically from the extortion." *NOW v. Scheidler*, 968 F.2d at 630 n. 17 (citing *Town of West Hartford*, 915 F.2d at 102; *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnaped and threatened to kill doctor unless he agreed to stop performing abortions violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

Extortion under the Hobbs Act, thus, focuses on the loss to the victim. *United States v. Santoni*, 585 F.2d 667, 672 (4th Cir. 1978) ("the gravamen of the offense [of extortion under the Hobbs Act] is loss to the victim," quoting *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)). If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss.[20] The plaintiff clinics allege that the Defendants deprived them of: (1) business between patients and themselves; and (2) a business relationship with doctors and other personnel who were induced to quit because of Defendants' actions. The right to provide abortion services has specifically been included in the "property" included in the Hobbs Act protection, *Northeast Women's Center*, 868 F.2d at 1350, as has a business' goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980). Plaintiffs also allege deprivation of certain tangible items which were damaged or lost in various blockades and "blitzes" of the clinics. Summit alleges it lost a business relationship with a potential landlord because of Migliorino's actions and interference. These allegations are sufficient to show that the Plaintiffs parted with property.

Similarly, the Scheidler Defendants' contention that the "rule of lenity" restrains this court from deciding that no economic profit is required under the Hobbs Act. The Hobbs Act violations are predicate acts in a *civil* RICO action. The rule of lenity only applies to criminal actions. *United States v. Hopson*, 18 F.3d 465, 469 (7th Cir. 1994) ("The rule of lenity dictates that when a statutory ambiguity cannot be resolved through standard methods of interpretation, the ambiguity should be

---

[20] Plaintiffs' argument that the Defendants did "obtain" or seek to obtain the plaintiff clinics' patients, and the clinics' agreement not to perform abortions is therefore superfluous. The court need not reach this argument.

resolved in favor of the criminal accused," citing *Chapman v. United States*, 500 U.S. 453, 462-64, 111 S. Ct. 1919, 1926, 114 L. Ed. 2d 524 (1991); *United States v. Bass*, 404 U.S. 336, 347-48, 92 S. Ct. 515, 522-23, 30 L. Ed. 2d 488 (1971)). Thus, the rule is of no aid to the defendants in this case.

The court now turns to the remaining requirements to allege Hobbs Act violations. *See Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d at 281. Plaintiffs allege, and the Defendants do not contest, that they parted with this property because they feared violence would occur if they did not. Moreover, Plaintiffs allege that the Defendants, through the PLAN enterprise and individually, threatened and committed forceful and violent acts against them and other similarly situated clinics. Third, Plaintiffs have alleged the Plaintiffs' businesses function in interstate commerce, because some patients do not reside in the state where the clinics are located. Thus, Congress' power, and therefore the Hobbs Act, reaches the Defendants' activities. The Hobbs Act predicate acts are well-pled.

United States v. Enmons, 410 U.S. 396, 406 n. 16, 93 S. Ct. 1007, 1013 n. 16, 35 L. Ed. 2d 379 (1973), cited by the Defendants, is not to the contrary. *Enmons* says that when labor unions strike for legitimate purposes, the Hobbs Act does not apply to those activities. The problem is, of course, that in labor strikes, the purpose is to cause or threaten economic harm to achieve the union's purposes. Similarly, here the aim was to cause economic harm to achieve the defendants' purposes. In labor law the use of this concerted activity to cause or threaten harm is specifically sanctioned by statute – here it is not. Moreover, the ultimate goal of these defendants is to interfere with the exercise of a constitutional right. This is so far removed from the circumstances of *Enmons* that any reliance upon that case by defendants is misplaced.

Finally, the Terry Defendants' contention that this well-accepted view of the Hobbs Act would encompass "virtually any unlawful activity designed to change anyone's conduct" is erroneous. The vast majority of circuits who have passed on this issue were not concerned with this issue. Moreover, the Act

is not without limits. The Act specifically limits "extortion" to acts that were induced by wrongful use or threatened use of "*force, violence, or fear, or under color of official right.*" 18 U.S.C. § 1951(b)(2) [emphasis added]. This distinguishes the situation in which persons agree to a peaceful boycott and picketing of a business to achieve legal objectives. Thus, Defendants' examples of chaining oneself to a redwood and blocking the entrance of an auditorium would not violate the Act unless done in a manner so as to threaten force, violence, or fear. To be sure, the use of the Hobbs Act in cases such as *Northeast Women's Center* and *Town of West Hartford* may approach the limits of the Act's reach. However, Defendants are simply incorrect in asserting that allowing the Hobbs Act predicate acts stand greases a "slippery slope."

Defendants' argument that this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience is correct, but that argument works in Plaintiffs' favor. Indeed, many who fought segregation using civil disobedience – as well as those who used violence – *were* arrested, jailed, and otherwise punished. The court reminds the Defendants that Dr. Martin Luther King, Jr. spent many days in jail for his civil disobedience. Indeed, many of the acts of civil disobedience during the 1960's were committed to test the constitutionality of the laws that were disobeyed. Because one fights a political cause does not mean that his conduct is immunized from liability. The law applies to all citizens in this country, even those who violate the law out of conscience. Currently, the law protects clinics who perform legal procedures, including abortions. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota,* 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

2. Pleading a RICO Conspiracy

RICO prohibits any person from conspiring to violate any of its subsections. 18 U.S.C. § 1962(d). The core of a RICO civil conspiracy is an agreement to commit predicate acts. Defendants claim that the Complaint does not plead a RICO conspiracy violation with adequate specificity. The Scheidler Defendants and Migliorino argue that Plaintiffs have not alleged that there was an agreement between the parties to conduct an "enterprise." Defendants also argue that the failure to allege specifics about the "agreement" of the parties should be fatal. Plaintiffs maintain that they have alleged sufficient agreement to withstand this motion to dismiss the RICO conspiracy count.

A RICO conspiracy claim is governed by traditional concepts of conspiracy law, and "'should not require anything beyond that required for a conspiracy to violate any other crimes.'" *Schiffels*, 978 F.2d at 348 (7th Cir. 1992) (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986)). "Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves." *Schiffels*, 978 F.2d at 348 (citations omitted). "Thus, while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts, it does not require that any predicate acts actually be committed." *Id.* (citations omitted). Thus, a civil RICO conspiracy complaint must allege, at the very least, an agreement to commit a pattern of predicate acts or facts from which such an agreement may be inferred. *Schiffels*, 978 F.2d at 352 (may allege facts from which agreement to violate § 1962 may be inferred); *Hecht*, 897 F.2d at 25 (must allege agreement specifically); *see Rose*, 871 F.2d at 366 (conspiracy claim must contain supporting facts which describe the conspiracy's general composition, its objectives, and the defendant's general role in the conspiracy). In other words, the agreement which is alleged under section 1962(d) must be pled with at least some degree of particularity. All that is required by the Seventh Circuit at this stage is that the Plaintiffs allege (1)

that each defendant agreed to conduct the affairs of an enterprise; (2) that each defendant agreed to the commission of at least two predicate acts (or to the furtherance of the enterprise through predicate acts); and (3) that each defendant knew that those predicate acts were part of a pattern of racketeering. *Schiffels*, 978 F.2d at 352; *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986).

The Plaintiffs have met this burden as to all defendants except Wojnar and Project Life, who will be dismissed from this case. Plaintiffs have alleged that the other defendants (except Vital-Med) have agreed to drive all clinics who furnish abortion services out of business – in fact, that was the purpose of their organization of PLAN. The Complaint alleges that Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). PLAL and Project Life **participated**[21] in the annual PLAN meetings. (Complaint § 41 (PLAL only), 49 (PLAL only), 55, 58). Scholberg attended a "mini-conference" in St. Louis on December 14, 1986, as well as other PLAN meetings. (Complaint §§ 53, 55). Migliorino **participated** in the PLAN convention in Chicago from August 25 to 27, 1988 and forced Summit's prospective landlord to breach the lease between the parties. (Complaint § 58, 80-81). Operation Rescue was part of PLAN's project to blockade clinics in furtherance of PLAN's purpose to close abortion clinics down, and conducted several blockades in New York City, Long Island, Cherry Hill, New Jersey and Atlanta. (Complaint §§ 60, 63, 64, 66). Murphy organized some of the OR blockades and assisted in the theft and storage of fetal remains from Vital-Med. (Complaint §§ 65, 69, 70, 71). Murphy also **participated** in annual PLAN conventions. (Complaint § 84). Scholberg, for example, attended a PLAN "mini-conference" on December 14, 1986 in St. Louis, Missouri, took part in the annual PLAN convention in Atlanta, Georgia on May 2, 1987, and was the assistant director of PLAL

---

[21] See *supra* note 19 regarding what the plaintiffs must prove "participate" means in order to state a section 1962(c).

from February, 1988 until approximately 1990. (Compl. §§ 13, 53, 54). PLAL allegedly took part in numerous PLAN conventions and **participated** in the organization and execution of several violent clinic blockades. (RICO Case Stmt. pp. 13-14).

Thus, plaintiffs have alleged that each of the defendants except Wojnar, Project Life, and Vital-Med have participated in PLAN's affairs as an enterprise, which is all that is required to plead substantive RICO. The rest of the defendants have an affiliation with PLAN and showed at least tacit agreement to "operate or manage" its affairs. The question is whether tacit agreement alone states a RICO conspiracy sufficient to withstand these motions to dismiss. Defendants have argued that this court should require proof of at least some overt act in furtherance of the conspiracy. In making this argument, defendants not only espouse the minority position, they ignore the law of this circuit. *Compare United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied,* 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986); *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir.), *cert. denied,* 488 U.S. 852, 928, 109 S. Ct. 138, 314, 102 L. Ed. 2d 110, 332 (1988); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied,* 475 U.S. 1128, 106 S. Ct. 1656, 90 L. Ed. 2d 199 (1986); *United States v. Local 560*, 780 F.2d 267, 294-95 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied,* 460 U.S. 1011, 103 S. Ct. 1249, 1250, 75 L. Ed. 2d 479 (1983); *with United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985), *cert. denied,* 475 U.S. 1098, 106 S. Ct. 1498, 89 L. Ed. 2d 898 (1986) (criminal RICO case in which proof of overt act in furtherance of the RICO conspiracy required); *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir. 1985), *cert. denied,* 475 U.S. 1048, 106 S. Ct. 1269, 89 L. Ed. 2d 577 (1986).

The Seventh Circuit has stated "[t]he substantive proscriptions of the RICO statute apply to insiders and outsiders – those merely 'associated with' an enterprise – who participate directly

and indirectly in the enterprise's affairs through a pattern of racketeering activity." *United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987) (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978)). In other words, if Plaintiffs have alleged that the Defendants committed acts in furtherance of PLAN, that is enough to show agreement to the conspiracy. Nothing more is required. The clearest form of agreement is Scheidler's and Terry's participation in PLAN's leadership council. By participating in this council, both Scheidler and Terry agreed to lead PLAN which, in turn, is alleged to be an illegal enterprise. This agreement to participate in PLAN's activities, coupled with the agreement to commit predicate acts, establishes "operation and management" and therefore potential liability against Terry and Scheidler. *See Reves*, 507 U.S. at ---, 113 S. Ct. at 1169.

"Participation" in PLAN's annual meetings by Murphy, Migliorino, and PLAL are closer calls. However, the allegations that these parties participated in meetings are coupled with allegations of the commission of other activities in furtherance of PLAN's purpose to shut down abortion clinics. Either one of these allegations, standing alone, would be insufficient to impose liability under § 1962(d). However, taken together, the allegations show sufficient agreement to meet the first prong of the *Schiffels* analysis (that each defendant agreed to conduct the affairs of the enterprise). Thus, the first prong of the analysis is satisfied.

The second prong in the analysis is whether each defendant agreed to the commission of at least agreed two predicate acts, or at least to the furtherance of the enterprise. *Schiffels*, 978 F.2d at 352; *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990). Defendants contend that this statement of the law is insufficient. Defendants argue that they must have agreed to participate in each predicate act. This is patently wrong. All *Schiffels* requires in order for a defendant to be held liable for RICO conspiracy under § 1962(d) that he or she *agree* to the commission of at least two, but only two, predicate acts. *Schiffels*, 978 F.2d at 352. Moreover, there is some support

within this circuit for an even lesser standard: that the defendants agree to conduct themselves on behalf of an enterprise. *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987).

This does not mean that each defendant must have *committed* two predicate acts – only that each *agree* to their commission. In other words, each defendant must have agreed to the commission of two acts in furtherance of the enterprise, or, at a minimum, agreed to the furtherance of the enterprise generally. The Complaint passes this test as to all defendants except Wojnar, who has never been alleged to have attended a PLAN conference or participated in PLAN's leadership.

The final prong of this test is whether the defendants knew that the acts were committed in a pattern of racketeering, *Schiffels*, 987 F.2d at 352, with "awareness of the nature and scope of the enterprise and intended to participate in it." *United States v. Muskovsky*, 863 F.2d 1319, 1324 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1345, 103 L. Ed. 2d 813 (1989). Plaintiffs have met their burden here as well. PLAN's essential purpose, viewed in a light most favorable to Plaintiffs, was to engage in a pattern of racketeering activity (such as blockades and theft) that was designed to inflict, and has inflicted, injury on the business and property of plaintiff clinics who provide such services. (Complaint §§ 1, 41). Clearly, Scheidler and Terry, who sit on PLAN's leadership council, have sufficient understanding of PLAN's workings to know the scope of the enterprise. This knowledge may also be imparted to PLAL, who in June of 1984, is alleged to have participated in the formulation of a six-month "plan of national activities." (Complaint § 37). Scholberg's awareness, viewed in light favorable to the Plaintiffs, may be inferred from his participation in PLAN's mini-conference on December 14, 1986, in which it was specifically agreed that one of their goals was to close down clinics that perform abortion. (Complaint §§ 53-54). OR's and Project Life's awareness, viewed in light most favorable to Plaintiffs, may be inferred from its "participation" in PLAN's annual conferences in which PLAN declared that it would try to stop abortions at clinics "by any and all means available. No abortion clinic will be spared," and where blockades were endorsed as necessary to take business away from the clinics. (Complaint §§ 55, 58). Murphy's awareness of the scope of the enterprise may be inferred from his "participation" in PLAN conferences, including being a featured speaker. (Complaint § 58). The court reminds the plaintiffs that it cannot conclude that simply attending one PLAN meeting would necessarily show that the defendant understood the scope of the enterprise.

Migliorino's awareness of the scope of the enterprise is tenuous. Migliorino allegedly participated in one PLAN conference on August 25-27, 1988, in which the overall goal of shutting abortion clinics down was discussed, and she was a speaker. (Compl. § 17). The substantive allegations against Migliorino involve one cluster of conduct surrounding the theft of fetal remains from Vital-Med, and one cluster involving interference with Summit's future landlord. (Complaint §§ 67-75, 80-81). The court concludes that these actions, taken together in a light most favorable to Plaintiffs, could show that Migliorino participated in and was aware of the scope of the enterprise, and she will not be dismissed now. It is possible that the Plaintiffs could prove some set of facts which would entitle them to relief against Migliorino under § 1962(d).

Wojnar, on the other hand, has not been named under "substantive RICO," and the only action that he is alleged to have participated in is the theft of the fetal remains. (Complaint §§ 82, 67-71). This need not be addressed here, as he will be dismissed on procedural grounds.[22] All other Defendants remain

---

[22] Even if Wojnar were not dismissed on procedural grounds, this court would dismiss him from this complaint based on lack of awareness of the scope of the enterprise. Facts that would imply Wojnar's awareness of the scope of the enterprise are limited. Wojnar points out in his reply that the Amended RICO Case Statement implicates him in two other actions; a May

under section 1962(d), with the possible First Amendment concerns of this conclusion addressed below.

3. Other Predicate Acts

Defendants have made various arguments about each of the predicate acts alleged in the complaint. The court will address each in turn.

a. Travel Act and State Law Extortion as Predicate Acts

The Terry Defendants argue that the Travel Act allegations are insufficient because the Travel Act requires that underlying acts of extortion, bribery, or arson be pled. Moreover, the Defendants maintain that extortion under the Travel Act requires that property be obtained by the perpetrator. Plaintiffs argue that no property need be received by the perpetrator; all that need be satisfied is that state extortion statute be violated. Plaintiffs maintain that the extortion laws of Alabama, Colorado, Florida, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Wisconsin, and Wyoming do not require that the defendant receive property from the victim; only that the victim to give up either a tangible or an intangible property right.[23] Plaintiffs also argue that Defendants violated these laws.

11, 1985 clinic invasion and blockade and a November 11, 1985 clinic invasion and blockade. (RICO Case Statement p. 36). All these actions could be individual occurrences, without any input from or understanding of the PLAN enterprise. Thus, Wojnar would have been dismissed here based on lack of knowledge of the scope of PLAN. *United States v. Muskovsky*, 863 F.2d 1319. Wojnar's arguments regarding the sufficiency of the predicates as alleged against him will not be addressed, nor will his statute of limitations argument be considered; both of these arguments are moot as to him.

[23] The clinics wish to maintain this suit as a class action, which could bring virtually every other state's extortion statute into play. However, because the class has not yet been certified, there is no need to address those other statutes at this time.

The Travel Act was primarily designed to stem the "'clandestine flow of profits' and to be of 'material assistance' to the States in combating pernicious undertakings which cross State lines." *Nardello*, 393 U.S. at 292, 89 S. Ct. at 538 (quoting S. Rep. No. 644, 87th Cong. 1st Sess., 4 (1961)). The Travel Act reaches:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3). . . .

18 U.S.C. § 1952. Unlawful activity as defined in the Travel Act includes extortion, bribery, and arson "in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b). Unlike the Hobbs Act, the Travel Act does not define "extortion" in the statute; it leaves the definition up to individual state law. *United States v. Nardello*, 393 U.S. 286, 289 n. 3, 89 S. Ct. 534, 536 n. 3 (1969). Thus, if the violations of the underlying state law extortion statutes are well pled, so are the Travel Act violations.

At common law, "extortion" could only be committed by a public official who obtained property not due to him or his office under color of law. *Id.* Many states have expanded upon such definition to include acts committed by private individuals whereby property is obtained by force, fear, or threat. *Id.* DWHO and Summit (Delaware and Wisconsin residents, respectively) have each pled violations of their state extortion statutes. Only Delaware and Wisconsin law will be addressed because, although plaintiffs wish to maintain this as a class ac-

tion, the only plaintiffs currently before the court are DWHO and Summit.

The relevant Delaware statute provides:

> A person commits extortion when, with the intent . . . he compels or induced another person to deliver property to himself of to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:
>
> (1) Cause physical injury to anyone; or
>
> (2) Cause damage to property; or
>
> (3) Engage in other conduct constituting a crime; or
>
> (4) Accuse anyone of a crime or cause criminal charges to be instituted against him; or
>
> (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject anyone to hatred, contempt, or ridicule; or
>
> (6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> (7) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
>
> (8) Perform any other act which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Del. Cod. Ann. tit. 11, § 846 (1990).

Defendants allege conclusorily that this statute requires obtaining property and plaintiffs have failed to allege this element. Plaintiffs maintain that they *have* alleged that Defendants obtained property from them because Delaware's definition of property is broad enough to encompass DWHO's agreement not to enter business relationships with their patients.

Only a state court can authoritatively interpret its own state statutes and laws. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 1404, 28 L. Ed. 2d 822 (1971); *Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983). Delaware apparently has not construed the definition of property in this context. The parties have cited no authority on the matter, and the court's independent research has found a similar void. In the absence of guidance from Delaware state courts, a federal court should decide the issue in a way in which it believes the highest state court would rule of the issue were presented to it. *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*, 9 F.3d 561, 574 (7th Cir. 1993). This is difficult here, as it requires this court, sitting in Illinois, to determine what the Delaware Supreme Court would decide. In this difficult circumstance, this court will focus on the language of the statute itself.

In its statute on theft, Delaware's definition of property is: "*anything of value except land,* and includes . . . documents although the rights represented thereby have no physical location, contract, rights, choses in action. . . ." Del. Cod. Ann. tit. 11 § 857(4) [emphasis added]. Moreover, Delaware Supreme Court *has* concluded: "[t]he offense [of extortion] is complete when the threatening statement or communication is made, or is caused to be made with the intent to extort or wrongfully gain money or other property." *Bilinski v. State*, 462 A.2d 409 (Del.1983) (quoting *Bove v. State*, 33 Del. 229, 134 A. 630 (Del. Supr.1926)).

Property is defined as "anything of value except land . . . including rights that have no physical location." Del. Cod. Ann. tit. 11 § 857(4). It appears that the Delaware legislature attempted to make its theft statutes as broad as possible in order to combat crime most effectively. This court has already concluded that in the Hobbs Act context, the right to do business and conduct business relationships is protected "property." *See supra* at 1072. Using a parallel analysis here, this court concludes that Delaware intended to have its crime statute reach as broadly as possible, just as Congress intended to allow the

Hobbs Act broad scope. DWHO's right to conduct business relationships with both its patients and its personnel are therefore protected by Del. Cod. Ann. tit. 11 § 846. Plaintiffs have pled that the Defendants obtained, or attempted to obtain the clinics' agreement not to enter into business relationships with patients, doctors, and personnel. Plaintiffs specifically pled that Scheidler entered DWHO, threatened clinic administrator Cathy Conner. (Complaint § 46). Plaintiffs allege that on April 12, 1986, Scheidler threatened that anti-abortionists would "get rid of" clinics such as DWHO. (Complaint § 47). The Plaintiffs' allegations satisfy Delaware § 846(8), which prohibits threatening to perform acts calculated to harm DWHO's business relationships. The Delaware extortion allegations are well-pled as either attempted or actual extortion.[24] The Travel Act is violated when the underlying state's law is violated and that violation affects interstate commerce. Thus, the Travel Act allegations, as alleged by DWHO, are also well-pled.

The same arguments are maintained by Summit regarding the Wisconsin extortion statute. The relevant Wisconsin statute prohibits individuals from:

> [V]erbally or by any written communication, maliciously threaten[ing] to accuse or accuses another of any crime or offense, or threatening or commit [ing] any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling, or trade of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act . . .

Wisc. Stat. Ann. § 943.30 (1995).

---

[24] To establish the commission of attempted extortion, Plaintiffs must show, inter alia, that the defendant took a substantial step toward "instilling" fear in another that he would cause "physical injury to anyone" or "damage to property," if property other than his own were not delivered to him. *Bilinski v. State*, 462 A.2d 409 (Del.1983); Del.Cod.Ann. tit. 11 §§ 531, 846(1), (2).

The Terry Defendants claim that the phrase "with intent thereby to extort money or any pecuniary advantage whatever" combined with the disjunctive "or with intent to compel the person so threatened to do any act against the person's will . . ." shows that this statute was designed to address two offenses; extortion by the first clause and coercion by the second. Further, Defendants point out that only extortion, and not coercion, is a predicate RICO offense. Thus, they argue, the Wisconsin extortion statute does not reach the conduct alleged in the Complaint.

Plaintiffs maintain that the Defendants have misconstrued the Wisconsin statute, and they cite both state and federal law in support of their position that Wisconsin does not require that property be "received." The Wisconsin Court of Appeals has held that "extortion may . . . be committed if no property or money is transferred, but the victim is coerced to do something against his or her will." *State v. Dauer*, 174 Wis.2d 418, 497 N.W.2d 766, 771 (App.1993). However, this conclusion was made in the context of distinguishing the Wisconsin extortion statute from the state robbery statute. Thus, this analysis is not as forceful as if the court had decided a case similar to this one, where the extortion/coercion distinction was at issue. However, no such a case has been cited or found. Thus, it is fair to conclude, in the absence of contrary authority, that Wisconsin does not require the receipt of property to be proven in order to establish an extortion offense.

Moreover, intangible property rights, such as choses in action, have been held to constitute "property" under Wisconsin's § 943.30. *State v. Manthey*, 169 Wis.2d 673, 487 N.W.2d 44 (App.1992), *rev. denied*, 491 N.W.2d 768 (Wis.1992) (Defendant who was prospective witness in a civil action and who threatened to have extensive memory lapses at trial unless she was paid to testify committed extortion by threatening to injure litigant's property interest in the suit). Thus, Defendant's argument that the right to conduct business relations is not recognized in Wisconsin is invalid. The Complaint's allegations that Plaintiffs were forced to give up their right to conduct business

relationships state a valid claim for relief under Wisconsin law. The Travel Act allegations are likewise valid, as the underlying state law claims have been properly pled. *See United States v. Nardello*, 393 U.S. 286, 89 S. Ct. 534, 536 n. 3, 21 L. Ed. 2d 487 (1969).

b. Theft of Fetal Remains As Predicate Act

Plaintiffs have pled violations of 18 U.S.C. § 659,[25] which prohibits theft from interstate shipment, as predicate RICO acts. The section 659 allegations arise out of Defendants' alleged theft of fetal remains and medical information thereon from Vital-Med's facility. The Scheidler Defendants claim that these allegations do not state valid predicate RICO acts because the fetal remains were not alleged to have been valued over one hundred dollars, as required by RICO 18 U.S.C. § 1961(1). Plaintiffs argue that they have pled enough to withstand this motion to dismiss, and that they will prove at trial that the fetal remains were worth "far more" than the one hundred dollar requirement.

In order for a section 659 violation to be a predicate act under section 1961(1), the act must be felonious. Under section 659, a defendant may only be convicted of a felony if the value of the property in question is at least one hundred dollars. *United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995). "Value" is defined in section 659 as "face par or market value,

---

[25] 18 U.S.C. § 659 provides:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, stationhouse, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part or which constitute an interstate or foreign shipment of freight, express or other property; or

. . . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money baggage, goods, or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

whichever is greater." *Id.* (quoting *United States v. Ditata*, 469 F.2d 1270, 1273 n. 3 (7th Cir. 1972). Market value, in turn, is "the price a willing buyer will pay a willing seller at the time and the place the property was stolen or at any time during the receipt or concealment of the property." *Id.* (quoting *United States v. Bakken*, 734 F.2d 1273, 1278 (7th Cir. 1984). The *Brookins* court was concerned with the sufficiency of the evidence which showed that the defendant was guilty of stealing a camera. Evidence was admitted showing that the undercover agent who arrested the defendant had been offered the camera for $350, to which the agent eventually agreed. *Brookins*, 52 F.3d at 617-18. The court concluded that this evidence was "more than sufficient" to establish the value of the camera over one hundred dollars. *Id.* at 619-20.

This case has a different procedural posture. Instead of reviewing a trial court's conclusion of the value of the property, this challenge comes in the form of a motion to dismiss. This court concludes that the Plaintiffs should have the opportunity to show that the fetal remains and the accompanying medical information were worth more than $100. It would be premature to dismiss the section 659 allegations without allowing Plaintiffs such an opportunity.

That being said, this court emphasizes the test set forth in Brookins will guide the evaluation of the evidence of the value of the property. However, in light of the lenient pleading requirements of the Federal Rules of Civil Procedure, the court will not dismiss the section 659 violations at this time. The Defendants are on notice of what dates, times, and actions support the Section 659 claim; that is all that is required of the Complaint at this juncture.

C. Availability of Injunctive Relief

The Plaintiffs have sued under 18 U.S.C. § 1964(c), which provides standing for private plaintiffs to enforce RICO. The subsection provides that any civil plaintiff "shall recover" treble damages and a reasonable attorney's fee. The Scheidler Defendants contend that this narrow statement of available relief pre-

cludes the Plaintiffs from suing to obtain equitable relief. Plaintiffs contend that they are entitled to seek injunctive relief, and, moreover, even if it is not so entitled, the form of relief to be obtained is "not a Rule 12(b)(6) issue."

Although Plaintiffs may be correct that, generally speaking, the form of relief is not an issue upon which a court could base a dismissal, this case raises peculiar issues in a unique posture. *See Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (court cannot dismiss a claim as long as some relief may be granted from facts alleged on the face of the complaint, citing 5 Wright & Miller, *Federal Practice and Procedure* § 1357 at 602 and n. 77 (other citations omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (court must be able to address the alleged injury with a favorable decision).

Section 1964, entitled "Civil Remedies," provides in subsection (a):

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by *issuing appropriate orders, including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; *imposing reasonable restrictions on the future activities* or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[Emphasis added]. Thus, it is clear that Congress intended to allow courts to issue injunctive relief.

Nonetheless, the circuits are divided on whether private parties may petition the court for injunctions for civil RICO violations. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). Some courts have concluded that this relief is not

available to private parties, *see Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986) (expressly holding injunctive relief not available to private litigants under RICO), *cert. denied*, 479 U.S. 1103, 107 S. Ct. 1336, 94 L. Ed. 2d 187 (1987); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt about whether RICO grants private parties . . . a cause of action for equitable relief."); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984) (RICO does not permit equitable remedies such as declaratory judgment and recision), while others have concluded that private plaintiffs *may* avail themselves of equitable remedies. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988) (holding that RICO does not authorize injunctive relief against transfer of all defendant's assets in a RICO action for treble damages, but not deciding "whether all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO"); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute), *aff'd other grounds*, 730 F.2d 905 (2d Cir. 1984), *see also* Batista, *Civil RICO Practice Manual* 169 (1987) (§ 6.13--The Availability of Injunctive Relief).

The Seventh Circuit has not yet ruled on this issue. However, in light of the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime," *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 this court is reluctant to read the statute in a limited way. Moreover, there is substantial authority for allowing private parties to seek equitable remedies, and even though that authority does not arise in this circuit, this court is persuaded by the rationale in those opinions. The court concludes that the Plaintiffs may seek the equitable remedies they ask for in the Third Amended Complaint. *Lincoln House*, 903 F.2d 845 (1st Cir. 1990); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983). Having concluded that the court's power encompasses the Plaintiffs' prayer for the court to "enjoin Defendants and their co-conspirators from further racketeering activity," the court notes that any potential injunction or "reasonable restrictions" imposed must pass muster under the First Amendment.

IV. First Amendment Concerns

Just two issues remain before the court at this time; both involve claimed constitutional rights. These issues are addressed last because, although they are part of the mandate of the Seventh Circuit, courts are constrained to decide cases without reference to the federal constitution whenever possible. *Redgrave v. Boston Symphony Orchestra Inc.*, 855 F.2d 888, 911 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). The first issue deals with the extent to which the First Amendment protects Defendants' actions, and the second concerns the facial constitutionality of the RICO statute.

A. Freedom of Speech

The Seventh Circuit directed this court to address, "if necessary, . . . which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution." *Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2.

This direction follows Justice Souter's comment in concurrence: "even in a cases where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Scheidler*, 510 U.S. at ---, 114 S. Ct. at 807 (Souter, J. concurring).

The Defendants argue that the use of civil RICO is inappropriate in this context because, even if they did commit predicate acts, their actions, including the allegations of attempt, advocacy, and commission of arson, kidnapping and murder, were done in the furtherance of their political beliefs. Therefore, Defendants argue, those actions are protected by the First Amendment. Defendants focus on three paragraphs containing predicate acts under count I (RICO § 1962(c)) of the Complaint in support of their position: paragraphs 87N, 87O, and 87Q. Paragraph 87N alleges that the RICO Defendants committed a predicate act of:

> **Encouraging, organizing, and inciting** the commission of arson, in violation of state arson and extortion laws, including but not limited to **[1] urging** the destruction of "bricks and mortar," and **[2] declaring** that arson is not "violence"; **[3] applauding and endorsing** acts of arson by co- conspirators'; **[4] encouraging, inciting and inducing** acts of arson through letters, speeches, films, various writings, and other media; **[5] urging** followers to act as if violence were permissible if it were to stop abortions; **[6] praising** the depiction of co-conspirators in front of clinics destroyed by arson; **[7] teaching** followers (including highly susceptible and vulnerable individuals) that arson is trivial and is justified if it prevents an abortion; **[8] encouraging** those who have committed arson to keep up their work **and assisting**

them in doing so; **[9] ridiculing** those who reject force and violence as a method to express their opposition to abortion, including but not limited to calling them "wimps," "wimps-for-life" and similar expressions; and **[10] encouraging** followers to emulate those who have been convicted of arson on repeated occasions. [Numbers and emphasis added].

Paragraph 87O alleges that the RICO Defendants "attempt[ed] and conspir[ed] to kidnap . . . **by encouraging, organizing, and inciting** the kidnaping of doctors who perform abortion . . . [emphasis added]" Paragraph 87Q alleges that the RICO Defendants attempted to commit murder **"by encouraging and inciting** members of the enterprise to commit murder. [emphasis added]" Although the Defendants do not cite other paragraphs of the complaint which may run afoul of the First Amendment, there are others which the court, in an independent analysis, believes call the First Amendment into question. These paragraphs[26] and the allegations contained therein will also be addressed because the Seventh Circuit has mandated that this be done.

Plaintiffs argue that they treasure the First Amendment and its protections as much as the Defendants, but that Defendants' acts are not immunized simply because they were committed with a political goal. Plaintiffs contend that the actions alleged in the complaint go beyond the protections of free speech and move into unprotected, violent action and/or unconstitutionally protected "incitement" speech.[27] Plaintiffs argue that to the

---

[26] The paragraphs are: §§ 28, 29, 30, 33, 36, 42, 45, 47, 57, 58, and 74.

[27] Plaintiffs also make significantly broader arguments regarding the First Amendment's application to the Complaint. For example, they argue that their reference to Scheidler's book *Closed: 99 Ways to Stop Abortion* in paragraphs 29 and 30 of the Complaint is admissible to show Scheidler's intent, even though the book is clearly covered by the First Amendment's protection and cannot be argued to be a predicate act. (Response p. 2 n. 1). None of the defendants chose to raise this issue in their motions to dismiss. Nonetheless, this court must address them as mandated by the Seventh Circuit.

extent that free speech issues are implicated by the Complaint, they may be adequately addressed by giving a proper jury instruction at the time of trial. (Response p. 4 n. 6). Plaintiffs also argue that the Defendants' speech and actions have created a "context of violence" which causes them to fear for their safety if they were to pursue their rights as clinics to operate. Because the speech and actions created this "context," Plaintiffs argue, both the speech and the acts run afoul of the First Amendment and should be enjoined.

Central to the concept of civil liberties in this society is the idea of freedom of speech. The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievance.

U.S. Const. amend. I. "The First Amendment is a charter for government, not an institution of learning. 'Free trade of ideas' means free trade in the opportunity to p[illegible]de to action, not merely to describe facts." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 3423, 73 L. Ed. 2d 1215 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S. Ct. 315, 325, 89 L. Ed. 430 (1945)). Further, as Justice Brandeis aptly stated in his concurrence in *Whitney v. California,* 274 U.S. 357, 375, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J. joined by Holmes, J., concurring), *overruled other grounds, Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), freedom of conscience is essential to the "discovery and spread of political truth," to "stable government," and to "political change." Courts must therefore be extremely cautious of interpreting this important right in a limiting fashion. A key difficulty in freedom of speech litigation, and the critical problem in this case, is defining "speech" distinct from the actions surrounding it and from the actions the speech may, in turn, produce. *See* Lawrence Tribe, *American Constitutional Law* 788 (2d Ed.1988).

The essential issue in this analysis is whether the words used by the Defendants fall into the "fighting words" exception to First Amendment protection. If the speech that Defendants engaged in falls within this exception, this court has authority to enjoin similar future speech. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) is the current state of the law regarding "subversive advocacy," or "fighting words," or speech that calls for or tends to produce or incite violence. In *Brandenburg*, the Supreme Court struck down an Ohio law which was not "directed to inciting or producing *imminent* lawless action [emphasis added]" and "likely to produce such action" yet nonetheless prohibited speech. *Brandenburg*, 395 U.S. at 447, 89 S. Ct. at 1829. *The only way that a state may regulate speech is if the speech* does *call for immediate illegal acts which are likely to occur following the speech.*

Thus, in order to qualify as "fighting words," the speech must (1) incite imminent illegal activity and (2) be likely to produce such activity. The freedom of speech is an essential right which is to be abridged only where "emergency . . . makes it immediately dangerous to leave the correction to time." *Abrams v. United States*, 250 U.S. 616, 630-31, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919) (Holmes, J. dissenting); *see* Tribe, *American Constitutional Law* at 844.

Some commentators have argued that the "imminence" standard requires that the time between the speech and the action be so brief that there is no opportunity for rebuttal or reflection. *See* David A.J. Richards, *Toleration and the Constitution* (1986) (Arguing that the best way to protect free speech is to allow the freedom to reach the boundaries of "equal liberty of conscience," which is the essential element of this society.) Plainly, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448, 89 S. Ct. at 1830 (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21, 6 L. Ed. 2d 836 (1961).

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, the Court reversed a judgment which awarded damages caused by a seven-year boycott organized by the plaintiff NAACP and its members, which was imposed against defendants, who were white-owned businesses, to achieve integration. *Claiborne Hardware Co.* is factually similar to this case because both cases dealt with political protest mixed with violence. The *Claiborne Hardware Co.* boycott consisted of picketing and "disciplining" African Americans who continued to patronize white-owned stores. The "discipline" consisted of members of the NAACP, called "Black Hats" or "Deacons," who stood outside white-owned stores and identified African Americans who transacted business with them. The Deacons then published the names of the "offenders" both orally at the NAACP meetings, and in a paper called the "Black Times." The lower court also observed that four incidents which clearly involved violence occurred because the victims ignored the boycott, and noted six others that showed an "unlawful form of discipline was applied to certain boycott violators." *Claiborne*, 458 U.S. at 905, 102 S. Ct. at 3421. Half of those ten incidents were found to have occurred in 1966, but none were conclusively found to have occurred after 1966, even though the suit was brought in late 1969. The Court concluded that the "coercion, intimidation, and threats" were "part of the boycott activity" and were protected by the First Amendment. *Claiborne*, 458 U.S. at 906, 102 S. Ct. at 3423. However, and importantly, the Court expressly distinguished *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, *reh'g denied*, 312 U.S. 715, 61 S. Ct. 803, 85 L. Ed. 1145 (1941). In *Milk Wagon Drivers* the Court upheld an injunction that prohibited both violent and nonviolent picketing and protesting activity because of the violent environment and conduct surrounding the activity. The *Claiborne* court distinguished *Milk Wagon Drivers* by stating, "in this case [*Claiborne*] the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained

over a 7-year span." *Claiborne*, 458 U.S. at 924, 102 S. Ct. at 3431. Thus, the Court gave great importance to the context of the violence in which the speech/nonspeech activities rested. Where there is a context of violence over the entire time span of the suit, and that violence is of a serious nature, such as was the case in *Milk Wagon Drivers* (in which at least fifty instances of window-smashing, explosive bombings, stench bombs, destruction of trucks and stores, serious injury to drivers and storekeepers, arson, threats and the like), the Court gives greater weight to the protection of citizens and property and less to free speech concerns. The protest speech in *Milk Wagon Drivers* occurred by both words and violent actions. Indeed, that court constructed the question as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are *enmeshed* with contemporaneously violent conduct which is concededly outlawed." *Milk Wagon Drivers*, 312 U.S. at 292, 61 S. Ct. at 554. The violence which was used to protest the method of milk distribution was plainly not protected by the First Amendment, although the picketing plainly was. However, where the protest activity is relatively peaceful, with only minor breaches of the peace, it is more likely that the Court will guard free speech privileges of the protesters with greater vigilance. More importantly, when peaceful and violent activity are "enmeshed," that fact counsels in favor of regulation of the entire range of action.

Plaintiffs contend that this case is analogous to *Milk Wagon Drivers* and argue that the context in which the Defendants' speech was conducted should remove it from the protection of the First Amendment. Plaintiffs have alleged the following specific acts which provide a context of violence in which Defendants' alleged "speech" took place:

(a) Between June, 1984 and the end of 1985: forty (40) acts of arson on clinics that provide abortion (§ 40);

(b) In March of 1986: one attempted arson (§ 44); March 26, 1986: one occurrence of destruction of clinic property (§ 43); assault and physical injury of five persons, four on March 26, 1986 and one in December of 1987 (§§ 57, 87D);

(c) On April 12, 1986: one occurrence of criminal trespass and harassment (§ 48);

(d) Twelve individually cited violent blockades in which at least one of the Defendants participated and, inter alia, blocked traffic in and out of the clinics and in which confrontations with police and patients occurred and hundreds of arrests were made on April 19, 1986, November 28, 1986, November 29, 1986, April 30 through May 2, 1987 (one per day – three total), August 27, 1987, November 28, 1987, and May 2 through 5, 1988 (one per day – four total) (§§ 44, 49, 51, 55, 58, 62, 63, 87D, 87I(1));

(e) Beginning July 19, 1988 and continuing until December 1988, a series of Operation Rescue actions occurred in Atlanta, Georgia (§ 64);

(f) On October 29, 1988, which was called the "National Day of Rescue" pro- life activists blockaded forty clinics across the country and in Toronto, Canada (§ 65);

(g) Local Operation Rescue activities have continuously taken place across the country, in which more than 10,000 participants have been arrested (§ 66);

(h) On March 10, 1993, conspiracy to commit and commission of the murder of Dr. David Gunn.

Thus, a total of over one hundred violent events have been specifically alleged within the nine-year time span covered by the Third Amended Complaint. Although these acts must be assumed to be true by this court, they do not necessarily mandate that all of Defendants' free speech rights have been forfeited. "Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milk Wagon Drivers*, 312 U.S. at 296, 61 S. Ct. at 556. Protected free speech, which involves words and not actions, is not implicated by the activities outlined above in (a) through (h). The Plaintiffs must allege that the protected speech, such as inciting, encouraging, and the like, is "enmeshed" in the violent acts. Specifically, Plaintiffs must allege that the Defendants' speech activity was so closely linked in time and place to the violence

that the law must intervene and prohibit the provocation from occurring. They have not done so here.

Moreover, this complaint seeks not only to enjoin the Defendants from "further racketeering activity," which may or may not include speech, but it also seeks to impose civil damages for activities which clearly include speech to some degree. *See* §§ 87N, 87O, 87Q (alleging predicate acts consisting of encouraging, organizing, inciting, urging, declaring, endorsing, praising, teaching, and ridiculing others to further the pro-life cause) and p. 67, *supra*. These verbs all describe *speech* and not violence in any way. The alleged speech is patently and firmly within the boundaries of freedom of expression. Those paragraphs must be stricken from the Complaint, as they do not allege predicate acts – rather, they allege legal protest actions protected by the freedom of expression.

Moreover, the protections of the First Amendment are usually used as a shield and not as a sword. *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1200 (D. Mass. 1985) ("The legal system stands ready to shield freedom against unlawful government intrusion, but reluctant to use the sword of damages to vindicate one claim of freedom by striking down another."), *modified,* 855 F.2d 888 (1st Cir. 1988), *cert. denied,* 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). RICO was not enacted to collapse the freedom of speech; it was enacted to give federal peace officers a powerful weapon with which to fight organized crime.

The Defendants have called into question only three paragraphs, while the court has found a total of seventeen which implicate the First Amendment. As noted, the Seventh Circuit mandated that this court address the issue of the First Amendment as it relates to this action. This court is obliged to address "which of the defendants' activities, as alleged, are protected by the First Amendment," and therefore all seventeen paragraphs will be discussed.

Encouraging activity which was not immediately followed by violence is protected by the First Amendment. "Immediately" means within a period which does not give time for reflection. Although the Supreme Court has not set forth a "bright-line" interpretation of what "immediately" means in this context, this court assumes it to mean at maximum a twenty-four hour period. The Plaintiffs' attempt to analogize to the situation in *Milk Wagon Drivers* fails because the protected speech and the violent activities are insufficiently linked. Having stated the court's conclusion, the specific paragraphs of the compliant need to be addressed. Unfortunately, Plaintiffs have alleged both protected speech and unprotected lawless action in the same paragraph, so it is difficult to specifically navigate and strike[28] full paragraphs. Moreover, as noted above, it is unclear what weight several of the paragraphs are to be given because they have not been incorporated into count I, although they were incorporated into count II.

---

[28] To strike portions of a complaint, the allegations being challenged must be so unrelated to plaintiff's claims as to be void of merit and unworthy of any consideration. *Robinson v. The Midlane Club, Inc.*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994). Further, the presence of the references sought to be stricken must be prejudicial to the movant. *Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525, 536-37 (N.D. Ill. 1993) (acknowledging the seriousness implied in any poorly supported allegations, but denying motion to strike where argument at issue was not devoid of merit); *Tektel, Inc. v. Maier*, 813 F. Supp. 1331, 1334 (N.D. Ill. 1992). Motions to strike are brought pursuant to Fed. R. Civ. P. 12(f) and are generally disfavored. *Robinson v. The Midlane Club, Inc*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994), *see, e.g., Imperial Constr. Management Corp. v. Laborers' Int'l Union, Local 96*, 818 F. Supp. 1179, 1186 (N.D. Ill. 1993) (granting a motion to strike affirmative defenses because they only added clutter to the case and because they were without merit, but upholding general rule disfavoring such motions); *Tektel*, 813 F. Supp. at 1334; *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill. 1991); 5A Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 1380, at 647 (1990). Nonetheless, striking portions of a complaint is appropriate when "certain references in a pleading . . . not the entire paragraphs containing them should be stricken." *Id.* at 651. This court will, to the extent necessary, strike only those portions of the Complaint which are wholly void of merit and serve only to implicate validly exercised First Amendment activities.

Paragraphs 29, 30, and 33[29] will be stricken in their entirety because they allege protected speech without any direct correlation with violent activity other than the "violent context" which was outlined above. This violent context, standing alone, simply cannot support the expansive restraint that Plaintiffs would impose on Defendants' freedom of speech. The phrase in paragraph 28[30] "encouraging others to participate in" will be stricken, as it does not apparently relate to violent activity.

---

[29] Paragraph 29 provides:

> Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion*, outlining methods intended to be used to interfere with clinics such as DWHO and Summit. Scheidler's manual encourages the use of predicate acts of racketeering activity to drive clinics such as DWHO and Summit out of business.

Paragraph 30 provides:

> Scheidler has traveled throughout the country training other persons to use racketeering activity, including but not limited to the methods outlined in *Closed: 99 Ways to Stop Abortion*.

Paragraph 33 provides:

> Terry has traveled throughout the country encouraging, organizing, and training other persons to use racketeering activity, including blockades designed to stop ingress and egress to the clinics, to close clinics that provide abortion and this force Plaintiffs to give up property rights.

[30] Paragraph 28 provides:

> In pursuit of their goal to drive every clinic out of business, Defendants (except Vital-Med) have traveled throughout the country, and/or used interstate telephone lines and U.S. Mail services for the purposes of engaging in, and/or *encouraging others to participate in*, their enterprise, which is devoted to the commission of racketeering activity at clinics such as DWHO and Summit. [Emphasis added]

Paragraph 36[31] directly correlates Scheidler's conference workshop presentation and a blockade at the Women's Awareness Clinic in Fort Lauderdale, Florida. Although Plaintiffs do not specifically allege that the blockade was violent, the court cannot conclude with certainty, given the violent factual context of many of these blockades, that this blockade was completely peaceful. Thus, in this posture, the court cannot strike the allegations contained therein.

Paragraph 42[32] is closely linked in time with a violent invasion of the Ladies Center of Pensacola, Inc. and therefore will not be stricken. Paragraphs 45 and 47[33] are likewise linked in

---

[31] Paragraph 36 provides:

> From May 10 to 12, 1984, the first National Pro-Life Conference, entitled "Action for Life" was held in Ft. Lauderdale, Florida. Scheidler presented a conference workshop on "Effective Confrontation: A 'How-To' of Picketing, Leafletting, Sit-Ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a Fort Lauderdale clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

[32] Paragraph 42 provides:

> On March 25, 1986, Scheidler, PLAL, and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in using racketeering activity to drive clinics that perform abortion out of business.

[33] Paragraph 45 provides:

> In April, 1986, Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down clinics such as DWHO and to galvanize them into action.

Paragraph 47 provides:

> On April 12, 1986, Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion activities.

time with Scheidler's criminal trespass and harassment occurring on April 11, 1986 at DWHO. Although these activities are not violent per se, they are criminal. However, a showing of non-violent criminal activity alone is not enough. The freedom of speech is one of this country's most highly prized freedoms, and the Supreme Court has stated in no uncertain terms that preventing violence is the only valid reason for squelching that right. Paragraphs 45 and 47 will be stricken because the facts as alleged do not provide the factual basis to infringe the freedom of speech as required by *Milk Wagon Drivers*.

Paragraph 57[34] does not contain an allegation regarding the length of time that passed between the threats and incitation and the physical assault that occurred. In light most favorable to the Plaintiffs, the court cannot strike the paragraph.

Paragraph 58 contains a direct link between speech and an unprotected violent "lock and block," and therefore will not be stricken. Paragraph 87N (see *supra* at 67) contains no non-speech allegations and therefore will be stricken in its entirety. The phrase "by encouraging, organizing, and inciting" will be stricken from paragraph 87O. The phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" will be stricken from paragraph 87Q.

V. Constitutionality of RICO

The final constitutional question that is at issue in this case is the facial constitutionality of RICO. The Scheidler Defendants challenge both statutes based on overbreadth and vagueness.

[34] Paragraph 57 provides:

> In December 1987, after numerous threats by Scheidler that he would close a Chicago women's health center and after incitation by Scheidler to give that clinic "a hard time" and to "molest" it, co-conspirator Anthony Lesniewski physically assaulted a security guard at the American Women's Health Center by attempting to run him over with a vehicle.

A. Vagueness

The Scheidler Defendants' vagueness argument points briefly to four aspects of RICO which could be the seed for this court to find that the statute is void for vagueness: (1) defining the "pattern;" (2) the scope of the "enterprise;" (3) applying the conspiracy crime to the enterprise; and (4) the impossibility of determining the "precise mental state that must be proved" in being liable for agreeing to engage in the enterprise. Amazingly, the Scheidler Defendants do no more than set forth these areas of difficulty without citing a single case in support of their position. Nor do they expand their accusations beyond pointing to the "fuzziness of [RICO's] contours of coverage about their [sic] outer fringes, [and] the vagueness of its provisions." Scheidler's Memo in Support at 15.

Although Justice Scalia invited facial challenges to RICO based on vagueness in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 253-56, 109 S. Ct. 2893, 2908-09, 106 L. Ed. 2d 195 (1989) (Scalia, J. concurring), the statute has been consistently upheld, despite a shower of challenges. *See, e.g., United States v. Sanders,* 962 F.2d 660, 678 (7th Cir. 1992); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991), *cert. denied,* 500 U.S. 919, 111 S. Ct. 2019, 114 L. Ed. 2d 105 (1991); *United States v. Andrews*, 749 F. Supp. 1517, 1519 (N.D. Ill. 1990) (Aspen, J.). More importantly, the Seventh Circuit has reaffirmed RICO's constitutionality "despite Justice Scalia's statements concerning the pattern requirements in his concurrence in H.J. Inc." *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992) (citing cases).

In light of this overwhelming precedent, the only basis upon which this court could sustain a vagueness attack on the statute would be to read the Supreme Court's conclusion in this case that there is no economic motive requirement for RICO. The parties have made no such argument as somehow changing the analysis to be applied in evaluating constitutionality. Under the decided cases, there is no logical argument that might implicate

vagueness (as opposed to overbreadth) in light of the lack of economic motive requirement. Thus, this court will follow *Ashman* and conclude that RICO is not unconstitutionally vague. Moreover, the Defendants have not outlined even the roughest thumbnail sketch of how the other three "seeds" could implicate a vagueness argument – not even a single law review article is cited supporting their position generally. Defendants apparently assume that this court will not only consider their argument, it will construct it as well. The court declines the invitation.

B. Overbreadth

The overbreadth challenge is more substantial. The overbreadth doctrine recognizes the "governmental purpose to control or prevent activities subject [to] regulation" while acknowledging that goal "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). An overbreadth challenge questions the statute facially because, given a reasonable interpretation of the scope of the statute, the statute reaches potentially protected speech. The analysis to be engaged in is "whether Congress has adopted a constitutional means in achieving its concededly legitimate [goal]." *United States v. Robel*, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967) (Warren, C.J.).

An overbreadth challenge may be brought based on a party's belief that the statute is unconstitutional as enforced against it, but also on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 & n. 17, 104 S. Ct. 2118, 2125 & n. 17, 80 L. Ed. 2d 772 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Adult Video Ass'n v. Barr*, 960 F.2d 781, 787 (9th Cir. 1992). For the Plaintiffs to prevail, there is no need for them to argue that the statute is unconstitutional *in this case*. Rather, the court invalidates the entire statute "on its face," so that the overbroad law becomes unenforceable until

a property authorized court construes it more narrowly. Gerald Gunther, *Constitutional Law* 1191 (12th Ed.1991), *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). In order to strike a statute based on overbreadth, the court must find that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 616, 93 S. Ct. at 2918. *Broadrick* emphasized that overbreadth invalidations were generally inappropriate where the allegedly impermissible implications of the challenged statute affected "conduct" rather than "speech." *Broadrick*, 413 U.S. at 616, 93 S. Ct. at 2918. In other words, if the statute in question is largely directed toward legitimately criminal activity, and merely touches the First Amendment ever so slightly at the margin, that statute need not be stricken because the overbreadth is not "substantial."

The Supreme Court recently considered the possibility that the forfeiture provisions of RICO are overbroad in *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). The *Alexander* defendants challenged RICO because, they argued, the forfeiture provisions are not limited solely to obscene materials and the sale of such materials. *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. at 2774. However, the Court recognized that this was an "unprecedented use of the overbreadth principle." *Id.* Importantly, the court stated in *dicta*:

> *But the RICO statute does not criminalize constitutionally protected speech* and therefore is materially different from the statutes at issue in our overbreadth cases. *Cf., e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 2572, 96 L. Ed. 2d 500 (1987).
>
> Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech.

Alexander v. United States, 509 U.S. at ---, 113 S. Ct. at 2774 [Emphasis added]. The Court concluded that the chilling effect of forfeiting protected materials is no greater than the chilling effect of a prison term, or a large fine. *Id.* Although Defendants' brief is woefully devoid of an articulation of *why* RICO is overbroad, this court will attempt to anticipate their argument so it may be addressed here.[35] This court believes that Defendants wish to make a "chilling" argument similar to that raised in *Alexander* regarding freedom of association. Defendants argue that allowing RICO to be used in this context threatens "others engaged in a variety of First Amendment activity." This court interprets that statement to mean that the freedom to associate with groups who engage in protected free speech activity as well as illegal acts is "chilled" by the threat of RICO prosecution. However, Defendants miss the point of *Alexander*'s *dicta* quoted above: there will be no threat of prosecution if there is no illegal activity committed on the part of the individual defendant. RICO, standing alone, does not criminalize or chill speech, period. Speech is not implicated by the statute one iota. To be sure, if the individual defendant engages in illegal activity in furtherance of the purpose of the organization, that activity is in no way immunized by either the fact that the defendant also spoke out in support of his cause, nor by the fact that the defendant is a member of an organization who supports, encourages, or advocates the illegal activity. As noted above, support, encouragement, and even "incitement" is not criminal unless the illegal activity so closely follows the speech in question that the speaker may be thought of as the "cause" of the illegality. But RICO itself has nothing to do with that conclusion. RICO is not overbroad.

---

[35] It seems clear that Defendants do not care how this court decides on these constitutional issues, given the lack of attention they gave their briefing of them. Defendants simply want this court to rule so they may reach the Court of Appeals and the Supreme Court on these issues. This court assumes that the Defendants will brief the issues with greater attention to detail at higher levels. However, the Defendants are reminded that they may appeal only those issues which were properly decided by this court; they may not raise new arguments at the appellate level that were not raised here. *U.S. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 n. 11 (7th Cir. 1995) (citing *Citizens Ins. Co. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994)). Defendants have done themselves a great disservice by not adequately briefing these issues because they will be bound on what they may appeal by what this court decides.

Finally, this court declines to address Defendant's argument that RICO is unconstitutional because it does not require a showing of "specific intent" to violate the statute. Specific intent is required to show a violation of a criminal statute. *Scales v. United States*, 367 U.S. 203, 221 n. 11, 81 S. Ct. 1469, 1482 n. 11, 6 L. Ed. 2d 782 (1961). Although RICO may be used criminally, this is a civil case. As such, the issue of specific intent is not relevant. Defendants, in their brief, attempt to confuse the issue by blending in the overbreadth analysis with their argument regarding specific intent. However, overbreadth analysis, and its accompanying relaxation of the standing requirement, is unique to First Amendment issues. There is no such relaxation of the standing requirement for consideration of other constitutional challenges. Defendants do not have standing to challenge the absence of a "mens rea" requirement here. *Scales*, *Alexander*.

VI. Conclusion

For the reasons stated in this memorandum opinion, IT IS HEREBY ORDERED THAT:

1. Defendant Conrad Wojnar is DISMISSED from this action;

2. Defendant Vital-Med is DISMISSED from this action;

3. Paragraphs 29, 30, 33, 45, 47, and 87N of the Third Amended Complaint are STRICKEN;

4. The phrase "encouraging others to participate in" is STRICKEN from paragraph 28; the phrase "by encouraging, organizing, and inciting" is STRICKEN from paragraph 87O; the phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" is STRICKEN from paragraph 87Q.

The court also concludes that RICO is facially constitutional as analyzed under both vagueness and overbreadth standards.

APPENDIX C

United States District Court, N.D. Illinois.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiff,

v.

Joseph M. SCHEIDLER; Andrew Scholberg; Timothy Murphy; Pro-Life Action League, Inc.; and Operation Rescue, Defendant.

No. 86 C 7888.

July 28, 1999.

MEMORANDUM OPINION AND ORDER

COAR, J.

Before this court are various post-trial motions filed by both the defendants Joseph Scheidler and Operation Rescue ("defendants") and the two plaintiff classes represented by the National Organization for Women ("NOW") and two reproductive health clinics, Delaware Women's Health Organization, Inc. ("DWHO") and Summit Women's Health Organization ("Summit") (together, as "plaintiffs"). Defendant filed a motion to decertify the class of NOW members and non-members as well as decertify the class of clinics. The plaintiffs filed a motion to

amend the complaint to conform to the evidence as well as a motion for Phase II damage trials. Plaintiffs also filed a petition for injunctive relief. Defendants' motion for decertification of the two classes is DENIED. Plaintiffs' motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction against defendants for a period of twelve years. All other motions are denied as moot.

Background

After thirteen years, this long and controversial case is entering one of its final stages. This case consists of a plaintiff class of reproductive health clinics and a class of potential women patients who brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO") against the defendants, a group of anti-abortion protestors. After a lengthy trial that occurred from March 4, 1998 through April 14, 1998, the jury returned a verdict for the plaintiffs on these civil RICO claims. While the procedural history of this case is recounted in detail in previous opinions,[1] the evidence presented at trial must be reviewed in order to understand the post-trial motions before this court.

At the trial, evidence spanning a period of twelve years of various incidents at reproductive health clinics was presented. This evidence included incidents across the entire United States: Chicago, Illinois; Wichita, Kansas; Cherry Hill, New Jersey; New York, New York; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; Fargo, North Dakota; Wilmington, Delaware; Atlanta, Georgia; San Antonio, Texas, to name a few. Several of these events were videotaped and showed defendant protestors chaining themselves to clinic doors

---

[1] See generally *NOW v. Scheidler*, 510 U.S. 249 (1994); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), cert. granted, 508 U.S. 971 (1993); *NOW v. Scheidler*, 1997 WL 610782 (N.D. Ill. 1997); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *NOW v. Scheidler*, 1995 WL 592228 (N.D. Ill. 1995).

and surrounding patients to block their path to the clinic entrances. Over the weeks of the trial, witnesses testified to the various acts of the defendants and others. A select few are described below:

-In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt." (Transcripts, p. 1008).

-In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." (Transcripts, p.1916). The patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

-In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protesters destroyed medical equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. (Transcripts, p. 663).

-In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." (Transcripts, p. 1445). The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

-In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. The patient had an appointment at the clinic for follow-up after a surgery to repair and restore her reproductive organs. However, she was confronted by the defendant protestors before she could enter the clinic:

> "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . They were shouting 'murderer, baby murderer.'. . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people, and they were grabbing their arms and grabbing at me. I didn't know what was happening, and I was yelling for [my friend] to help me. Then [my friend] was pushing the people away, and they were fighting . . . I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled 'oh, God help me,' a man hit me in the head with a big old sign. It was at this point that I grabbed [my friend's] arm and [he] grabbed me, and I put my arms around [his] waist. Then [he] was pushing the people away, and they were still grabbing and pulling at me. Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling thing like 'murderer.' I wondered, who did I kill? Who did I hurt?" (Transcripts, p. 1519).
>
> The patient lost consciousness as she began to bleed from her abdomen for protestors had caused her surgical incision to be torn open. Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. (Transcripts, pp. 1520-1522).

These are just a few examples of the incidents presented to the jury throughout this trial. Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of protestors. One clinic volunteer testified, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." (Transcripts, p. 1444). A patient recounted, "I was hysterical. I was afraid. I thought they were going to kill me." (Transcript, p. 1522). A clinic administrator reflected, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified . . ." (Transcripts, p. 663).

These incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants. PLAN was founded in 1984 to bring anti-abortion activists together to coordinate their activities across the United States. Scheidler and the founding members of PLAN believed that the lobbying and legislative efforts of other anti-abortion organizations, such as the National Right to Life, were not effective. (Transcripts, p. 3936). PLAN founding members believed in more "aggressive tactics," such as blocking clinic doors with their bodies and other objects in order to stop clinic patients and staff from entering the clinic, a tactic called "rescues." (Transcripts, pp. 3936-37). Scheidler, John Ryan, and Andrew Scholberg laid the initial ground work for PLAN.

The first meeting of PLAN occurred in Ft. Lauderdale, Florida in 1984. Over 600 activists attended, with Scheidler acting as the chair of the meeting. (Transcripts, pp. 3974, 4124). At that meeting, the "Leadership Council" was created with a geographic distribution to cover the entire United States. (Transcripts, p. 3990). PLAN began its initial fundraising efforts, promoting itself as an organization with over 2000 members with a network of regional directors to coordinate "rescue" activities. (Transcripts, pp. 3977-79). Eventually, PLAN created paid positions for a Director and an Associate Director, as well as paid for the travel expenses of the Leadership Council to various "rescues," or protests, across the country. (Transcripts, pp. 4098-99, 4255).

In 1987, at a PLAN Leadership Council meeting in Washington, D.C., Operation Rescue ("OR") was born. (Transcripts,

p. 4085). The stated purpose of OR was to be "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences." (Transcripts, p. 4091). The PLAN Leadership Council gave approval for the formation of OR, and to Randall Terry as its director, and agreed to OR's first field training, in Cherry Hill, New Jersey. (Transcripts, p. 4088). PLAN and OR began to act as joint organizations, where Randall Terry sat on the board of PLAN, Scheidler sat on the board of OR, and the two organizations began joint fundraising efforts. (Transcripts, pp. 4087, 4226, 4253).

The stated purpose of both PLAN and OR was "to put clinics out of business." (Transcripts, pp. 4149). In particular, these two groups were to work "behind the scenes" of the anti-abortion movement and use aggressive tactics, such as "rescues" and massive demonstrations. (Transcripts, pp. 4091, 4124). PLAN and OR achieved these goal in various ways. To communicate to PLAN members, Scheidler had a daily "hotline" for members to call, where times and locations of protests were announced. (Transcripts, pp. 3949, 4128). PLAN also issued a regular newsletter, promoting future protest events as well as reporting the results of various organized PLAN activities. (*Id.*). Scheidler himself also gave "advice" to PLAN members through the hotline and newsletters, as well as through PLAN speaking events. For example, Scheidler instructed PLAN members to "case out" clinics to learn their layout and make clinic staff know that they were "vulnerable." (Transcripts, p. 3930). Scheidler also advised members, when at protests, to not obey orders of clinic personnel. When he visited local PLAN groups, Scheidler insisted that at least some of the members enter the clinic facility when they were engaged in a protest. (Transcripts, p. 3932). Through the use of PLAN newsletters, speaking events, and conventions, PLAN leadership supported illegal tactics, such as physically entering clinics and blocking procedure rooms. (Transcripts, p. 3941). In fact, Scheidler took pride in the fact that PLAN created the "lock and block," where protestors physically lock their bodies to the doors of clinics or

other large objects in front of clinic doors. (Transcripts, p. 4124).

The most significant organizing tool for defendants was the annual PLAN convention, was held in different cities across the country. Evidence was presented about the PLAN convention, and the resulting activities, for each year from 1985 until 1997. Only a select number of these conventions will be highlighted here.[2] For example, in 1985, at the PLAN convention in Appleton, Wisconsin, PLAN members agreed to create "a year of pain and fear in the abortion industry." (Transcripts, p. 4006). One step towards that goal was a planned "Christmas Truce," where PLAN members were to return to their home communities and write the reproductive health clinics in their area to inform them that during month of December they would have to "close or be closed" by protesters blocking their doors. (Transcripts, p. 4007). In Chicago, PLAN sent these letters to every single reproductive health clinic that provided abortions in the area. (*Id.*).

In 1989, at the PLAN conference in Livonia, Michigan, PLAN members organized clinic protests to occur in Farmington, Michigan during the conference. (Transcripts, p. 4108). Several hundred protestors closed the clinic in Farmington and the "success" of the protests was reported in the PLAN newsletter. (Transcripts, pp. 4109-12). In 1991, clinic protests occurred for weeks in Wichita, Kansas shortly after the PLAN convention held there. (Transcripts, p. 4122). PLAN

---

[2] Each year the PLAN conference occurred, PLAN organized protests closed the clinics in that area. In Chicago in 1988, PLAN conducted workshop trainings on "lock and block" that were used in Chicago that year. (Transcripts, p. 4100). In Jackson, Mississippi in 1990, three clinics were closed by protestors during the PLAN conference. (Transcripts, pp. 4114-19, 4255). In San Antonio, Texas in 1992, clinics in the area were closed daily by protestors while the PLAN convention occurred. (Transcripts, pp. 4130-31). All of these protests were reported on Scheidler's Hotline and in the PLAN newsletter, praising the involvement of PLAN members, after they occurred. (Transcripts, pp. 4101, 4255, 4131).

leadership were significantly involved in the planning and execution of these protests. (Transcripts, pp. 4258-59).

PLAN created a successful design for the organizing of these protests. First, the protest would be announced on Scheidler's Hotline and communicated through PLAN members. PLAN leadership usually visit the site of the protest before it occurred. After the protest and clinic closing occurred, the results would be reported in the PLAN newsletter. For example, in Wilmington, Delaware in April of 1986, Scheidler entered, without permission, a reproductive health clinic with three other PLAN members and stated he was "casing the place." Even though he was asked to leave, he roamed throughout the clinic. (Transcripts, pp. 4036- 39). The next day, a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. (Transcripts, p. 633). PLAN reported this protest in its newsletter and other public relations materials and described it as a "fun time." (Transcripts, p. 4039). This same pattern occurred in Pensacola, Florida in March of that same year. (Transcripts, p. 3914). Members of the PLAN Leadership Council met in Pensacola and discussed how an "invasion" of this particular clinic could be orchestrated. It was agreed that some members would enter the waiting room of the clinic and others would enter the clinic through the back door. (Transcripts, p. 4012). The next day, the clinic was invaded by protesters, who "trashed the place," causing serious damage to surgical equipment and other medical supplies. The protesters were arrested. (Transcripts, pp. 4013-25). PLAN continued to use this same pattern of organizing, communication, and protest to close clinics throughout the country, as seen in New York City in 1988; Chicago in 1984, 1989, and 1996; Houston, Texas in 1990; and Dobbs Ferry, New York in 1991. (Transcripts, pp. 3996, 4095, 4113-14, 4119, 4190, 4256). The jury heard evidence tending to show that the objectives of the defendants at various protests included peaceful protest, informational picketing and leafleting, and acts of passive resistance in combination with intimidation (including violence and threats of violence) to stop abortions.

After reviewing the evidence, the jury returned a verdict for the plaintiffs on their civil RICO claims. In particular, the jury found 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 in violation of state law, and four acts or threats of physical violence to persons or property. Defendants were found liable for $54,471.28 in monetary damages to Summit Women's Health Organization and for $31,455.64 in monetary damages to Delaware Women's Health Organization.

Since the trial was completed, both defendants and plaintiffs have filed various motions as steps towards bringing this case to its conclusion. In order to expedite this process, this court held a hearing on the issue of injunctive relief in July of 1998. This court now addresses all remaining motions in this case.

Analysis

I. Decertification of the Classes

A. Decertification of NOW

Defendants argue that NOW should be decertified as the class representative for NOW members and non-NOW members because NOW lacks standing as an association. Citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Defendants argue that the testimony of four anonymous female witnesses at trial showed that individual participation of NOW members and non-NOW members was required to prove their claim, thus violating the third criteria for associational standing. (Dft's Corrected Motion for Decert., pp. 5, 12-13).

This court in a previous decision in this case found that NOW had associational standing under the *Hunt* test. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Hunt*, 432 U.S. at 343. In particular, the court found that NOW met the third criteria of the *Hunt* test, i.e. that the claim and the relief do not require individual participation in the lawsuit, for NOW was only suing for injunctive relief, an appropriate form of relief for an association to seek. *NOW v. Scheidler*, 897 F.

Supp. 1047, 1068- 69 (N.D. Ill. 1995), citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The court stated in that opinion:

"It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate Hunt's third prong." 897 F. Supp. at 1070.

The resulting testimony of the four anonymous witnesses at trial did not violate the third prong of *Hunt* test and therefore NOW maintains standing.

B. Decertification of the Clinic Class: Summit and the Wisconsin litigation

Defendants argue that Summit, one of the representatives of the Clinic Class, is precluded from bringing the claims on behalf of the class because of a dismissal with prejudice of claims brought on similar facts in Wisconsin state court. (Dft's Motion for Decert., p .3; Dft's Corrected Memo in Support of Decert., p. 4 fn.8). Therefore, the Defendants argue, under Wisconsin law and the full faith and credit clause, 28 U.S.C. § 1738, Summit is subject to claim preclusion.[3]

On August 25, 1997, Summit (under the auspices of the National Women's Health Organization of Summit, Inc.), along with the Milwaukee Women's Medical Services and Planned Parenthood of Wisconsin, filed state claims alleging invasion of privacy, assault, and public and private nuisance by Joseph Scheidler, PLAN, and other defendants in the present case, and demanded temporary and permanent injunctive relief, as well as compensatory and punitive damages. (Dft's App. to Post-Trial

[3] The Defendants argue that DWHO is also precluded because DWHO is in privity with Summit. However, there is no mention of DWHO, a Delaware-based clinic, anywhere in the papers of the Wisconsin case, nor have the Defendants present any evidence connecting DWHO to Summit. Therefore, the court will only consider the Defendants' claim preclusion arguments as they apply to Summit. After the trial was over and the instant motions were briefed, the Scheidler defendants sought to reopen the record, presumably to attempt to demonstrate "privity." That request was denied as untimely.

Motions, Vol. I, Ex. A). On September 22, 1997, an Amended Complaint was filed that did not include Summit as a plaintiff nor Joseph Scheidler nor PLAN as defendants. (Dft's App. to Post-Trial Motions, Vol. I, Ex. L). Counsel for Summit and Scheidler signed a stipulation and order for dismissal on December 1, 1997, that stated that the claims were dismissed with prejudice and a final order for dismissal was signed by Wisconsin Circuit Court Judge Charles Kahn. (Dft's App. to Post-Trial Motions, Vol. I, Ex. R). However, on February 24, 1998, just three days before the present case was to go to trial, Summit presented a motion to the Wisconsin Circuit Court to reopen and modify the stipulation and order for dismissal. (Dft's Appl to Post-Trial Motions, Vol. I., Ex. T). In response to the motion and a hearing on the matter, on February 26, 1998, Judge Kahn signed an order for dismissal that dismissed Summit's claims against Scheidler with prejudice, but with the stipulation that, "it is not the intent of this court that this order have any effect upon *National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.*, Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District." (Dft's Appl. to Post- Trial Motions, Vol. I., Ex. BB). On May 4, 1999, the Wisconsin Appellate Court reversed Judge Kahn's order and the cause has been remanded. *Milwaukee Women's Medical Service, Inc. v. Joseph Scheidler et al.*, No. 98-1139-FT, May 4, 1999 (Dft's Motion for Leave to Add to the Record, Attachment A).

Res judicata is an affirmative defense that must be raised or lost and the burden of establishing preclusion is upon the party claiming it. Fed. R. Civ. P. 8(c); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 4404, 4405. Counsel for Scheidler did not properly raise the defense prior to trial. The original dismissal in the Wisconsin case was filed December 1, 1997. However, in the over 500 pages Defendants filed in February, 1998 with the Final Pretrial Order, the Wisconsin litigation was never mentioned. Counsel for Scheidler did not inform the court of the Wisconsin litigation and its dismissal until February 19, 1998, in Defendant's Motion for Continuance

of All or Part of the Final Pretrial Conference or Trial. (Dft's Mot. for Cont., p. 14). In that motion, counsel for Defendant only states that claims filed by Summit against Scheidler in Wisconsin Circuit Court were dismissed with prejudice. (*Id.*). However, the counsel for Defendant never informed or even stated to this court what the Wisconsin state claims were. At the Final Pretrial Conference, Counsel for Defendant mentioned the litigation in Wisconsin again, but only as a support for his argument for continuance of the Final Pretrial Conference and not as an argument for res judicata. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 10-12). When asked repeatedly and directly by the court what the Wisconsin litigation had to do with the present case, Counsel did not answer the question. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 9-16). The court clearly stated to counsel that if he was requesting an order, he should submit it to the court in writing.[4] Neither before nor during trial did Counsel ever submit to this court any coherent statement of the position now asserted nor proffer any orders from the Wisconsin Circuit Court stating that there was a final judgment in that case. Therefore, the defendants did not timely raise the affirmative defense of res judicata and the defense is now lost.

Even if Counsel for Defendant had timely raised the res judicata defense before trial, Summit would not have been precluded from litigating these claims in federal court, for Judge Kahn of the Wisconsin Circuit Court ordered in his stipulation that the order for dismissal was not intended to affect the present case. (Dft's App. to Post-Trial Motions, Vol. I., Ex. BB). The most this court would have done is stayed the proceedings

---

[4] After continuous questioning of counsel, the court stated, "Mr. Brejcha, I have urged you since my involvement in this case not to mention matters to this court. That if you have something that you think is sufficiently important that affects the proceedings in this court, to put it in writing. The Federal Rules of Civil Procedure make it quite clear that a request for an order must be in writing except if the request is made during a hearing. So mentioning things in passing in court is of no particular moment." (Final Pretrial Conference Transcripts, February 20, 1998, pp. 15-16).

until the appeal of the Wisconsin state court judgment had been decided.[5] *Rogers v. Desiderio*, 58 F.3d 299, 302 (7th Cir. 1995) (finding that when a state court decision that could have claim preclusive effects on a federal case is appealed, the federal court should stay proceedings until the state case has reached a conclusion). When a state court has reached a final judgment that would have claim preclusive effects over pending federal litigation, the federal court must respect that judgment. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996). The Full Faith and Credit Act provides in part that the "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state." 28 U.S.C. § 1738. The Act "thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 877 (1996), quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982). Federal courts must accept that state's rules for determining the effect of the judgment. *Matsushita Electric*, 116 S. Ct. at 877.

Wisconsin has adopted a transactional approach to determining claim preclusion which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Northern States Power Co. v. Bugher*, 525 N.W.2d 723, 728-9 (1995), citing Restatement (Second) of Judgments § 24 (1982). However, under Wisconsin law, trial courts have broad discretion in crafting dismissals. "[A] trial court may totally accept or reject a stipulation presented by the parties for its approval." *Phone Partners Ltd. Partnership v. C.F. Communications Corp.*, 196 Wis.2d 702, 709, 542 N.W.2d 159, 161 (Ct.App.1995). Once the court ap-

---

[5] However, it is unclear from the papers submitted by Defendants if the Wisconsin trial court dismissal and stipulation was appealed before or after the trial in this present case.

proves a stipulation, it becomes the court's judgment. *Id.;* Wis. Stat. § 806.07(1). Therefore, if Defendants had raised their res judicata argument before the trial in this case, this court would have recognized the final judgment of the Wisconsin trial court and would not have found that the dismissal had a preclusive effect on the present case, since the stipulation specifically states that the dismissal has no effect on the present case. Since the trial and verdict in the present case, the Wisconsin Supreme Court has reversed and remanded Judge Kahn's dismissal and stipulation, stating that the Wisconsin trial court abused its discretion in approving the stipulation. *Milwaukee Women's Medical Services,* No. 98-1139-FT, May 4, 1999, p. 8. However, at the time that this court would have had to decide the preclusive effects of the Wisconsin case, this court would have had to respect the judgment of the Wisconsin trial court. It was not, and is not, the place of this court to go back and determine the legal validity of the Wisconsin trial court, but instead to respect the judgment of that court. *Kremer,* 456 U.S. at 482.

II. Rule 15(b): Amend Complaint to Conform to Evidence

The plaintiffs have moved under Fed. R. Civ. P. 15(b) to amend their complaint to include a claim arising under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a) ("FACE"), and state law extortion, assault, trespass, and tortious interference with prospective economic advantage. (Pls' 15(b) Motion, p. 2). The plaintiffs argue that the factual issues that underlie these claims were presented at trial. In particular, the plaintiffs assert that the defendants presented several pieces of evidence themselves that would support FACE and state law tort claims and that defendants did not object when plaintiffs presented similar evidence at trial. (Pls' 15(b) Reply, pp. 2, 4). This evidence is the same evidence that supports the predicate acts of RICO upon which the jury found the defendants liable. (Pls' 15(b) Reply, p. 5). That is, no doubt, the reason that defendants failed to object.

The defendants vigorously respond that they objected to the use of any evidence that was outside of the pleadings at trial. (Dfts' Resp. to Pls' 15(b), p. 2). Also, any evidence that they

admitted that supports a FACE or a state law tort claim was admitted for another purpose. (*Id.*). Finally, the defendants argue that amending the complaint to include FACE and state law tort claims would be prejudicial to the defendants, for the jury was not instructed on FACE or state law tort claims and thus no individuals were named in the jury findings. (Dfts' Resp. to Pls' 15(b), pp. 6-7).

A. Standard for 15(b)

Rule 15(b) states in part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in al respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Fed. R. Civ. P. 15(b)

Rule 15(b) creates a system in which "the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Duckworth v. Franzen,* 78 F.2d 645, 649 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986). The Intent of Rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986), quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). A Rule 15(b) amendment can occur either before, during, or after trial. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1491 (1990).

The key factor in determining whether an amendment should be allowed is whether the issue has been tried with the express or implied consent of the parties. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1998); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 456 (7th Cir. 1988); *Prescott*, 805 F.2d at 725. The test for this consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amend-

ment." *Prescott*, 805 F.2d at 725, quoting *Hardin*, 691 F.2d at 456 (10th Cir. 1982). For an opposing party to give implied consent, the party must either have not made the objection that the evidence presented at trial was outside of the pleadings, or the opposing party must have introduced the evidence his or herself. *Prescott*, 805 F.2d at 725. Therefore, Rule 15(b) requires the opposing party to show that he or she will be prejudiced by the amendment. Wright, Miller Kane, Federal Practice and Procedure: Civil 2d § 1495 (1990). The decision as to whether the issue in the amendment was actually tried by implied or expressed consent is within the district court's discretion. *Ippolito*, 864 F.2d at 456.

While Rule 15(b) is quite liberal, that does not mean that a motion to amend a complaint will automatically be granted. "[A] court will not imply consent to try a claim merely because evidence relevant to a properly plead issue incidentally tends to establish an unpleaded claim." *Ippolito*, 864 F.2d at 456, quoting *Quillen v. International Playtex, Inc.*, 734 F.2d 1258, 1272 (7th Cir. 1984). Furthermore, if the evidence presented by the opposing party that allegedly demonstrates consent is also relevant for another purpose, then the admission of the evidence is not considered consent and the pleadings should not be amended under 15(b). Wright, Miller & Kane, § 1493 (1990); see also, *Gorlikowski v. Tolbert*, 52 F.3d 1439 (7th Cir. 1995). Rule 15(b) also does not apply when the evidence does not support the theory upon which the court charged the jurors. *Jackson v. Crockarell*, 475 F.2d 746, 748 (6th Cir. 1973). Finally, the opposing party can defend against a 15(b) motion when the opposing party objected to the evidence during trial because it went beyond the scope of the pleadings. *Prescott*, 805 F.2d at 725.

B. Implied Consent

The plaintiffs argue that the defendants gave implied consent to the amended claims because they presented evidence themselves that supported the FACE and state law tort claims. (Pls' 15(b) Reply, p. 4). However, the court finds that the evidence to which the plaintiffs allude applies to the conspiracy claim and only incidentally to the FACE and state law tort

claims. Granted, several of the defendants' witnesses testified to observing or participating in various protests in front of class clinics. However, that evidence was presented in the defense of their actions as free speech and not as an act of conspiracy. Presenting that defense does not consent to federal claims of FACE or state law tort claims. Therefore, this evidence was relevant to another issue in the case.

More troubling for the court, however, is that the evidence that plaintiffs argue supports FACE and state law tort claims does not support the theory that was presented to the jury. In order for the jury to find the defendants liable under RICO, plaintiffs had to show that PLAN demonstrated conduct of an enterprise through a pattern of racketeering activity. *NOW v. Scheidler*, 1997 WL 610782,*6 (N.D. Ill. 1997), citing *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644-47 (7th 1995). The court instructed the jury that the plaintiffs had to show that PLAN was an enterprise that affected interstate commerce and that each defendant was associated with PLAN, was involved in operating and managing PLAN, and that each defendant's participation in PLAN was through some pattern of acts illegal under RICO. (Jury Instructions).

In contrast, under FACE, an individual may have criminal or civil penalties applied to them if that individual:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services . . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . ."

18 U.S.C. § 248(a)(1,3).

In the present case, the jury followed the verdict from and found that the defendants or other persons associated with

PLAN had committed acts or threats of extortion, acts and attempts of conspiracy, acts or threats of violence, in the last ten years. (Transcript, April 20, 1998, pp. 5185-91). However, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[6] Evidence was presented at trial from before and after the enactment of FACE, so the court does not know which evidence the jury relied upon in its findings. Since individuals are not named in the jury's findings, the court does not know who was found to have the requisite intent for FACE of the state law tort claims. Since the clinic incidents from across the country were presented and the plaintiffs have not stated which state law they claim, the court also does not know which state law to apply in the amended state law tort claims.[7] Therefore, the court finds that the plaintiffs' motion to amend the complaint to conform to the evidence is denied.[8]

Finally, as discussed later, there was some evidence presented after trial as to conduct at clinics after FACE was enacted. That evidence was offered to rebut defendants' claim that injunctive relief was unnecessary because FACE provided plaintiffs with a more focused remedy for addressing clinic blockades. That evidence was limited in nature and fails to establish a basis for the injunctive relief sought.

---

[6] The jury found 21 acts or threats of extortion in violation of federal law; 25 acts or threats of extortion under state law; 25 attempts or conspiracy to do any of the previously mentioned acts; and 4 acts or threats of physical violence to persons or property. The jury also found that these acts occurred within the last ten years and proximately caused injury to the business and property of the two clinics and the NOW class members. None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics. (Transcript, April 20, 1998, pp. 5183-91).

[7] The issue will be addressed in more depth in the section on the damage trials.

[8] Defendants' 12(e) Motion for a More Definite Statement is denied as moot.

III. Phase II Damage Trials

In the plaintiffs' Motion in Support of Phase II Trials for Absent Class Members, the plaintiffs argue the parties agreed before trial to conduct the litigation of this case in two phases: the first phase ("Phase I") would determine if the defendants were liable under civil RICO and would feature two representative clinics for the plaintiff clinic class. Phase I of the trial was conducted in March and April of 1998 and the jury returned with a verdict in favor of the plaintiffs. The proposed second phase of the litigation ("Phase II") would be a series of damage trials at which other members of the plaintiff clinic class would have an opportunity to prove their individual monetary damages. (Pl's Motion for Phase II Reply, pp. 2-3). According to the plaintiffs, the concept of two phases of trial has ruled this case through all the stages of litigation: from discovery and the notice to class members to the final pre-trial order and the final pre-trial conference. (*Id.*). Citing the *Manual for Complex Litigation,* the plaintiffs argue that the two-phase model for complex class actions is common. *Manual for Complex Litigation,* § 33.28 at 328, 330 (3d ed.1995); see also *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996). Finally, the plaintiffs state that the defendants never objected to the bifurcation of the liability and damages issues for trial and in fact agreed to the two stages of trial at one of the pretrial conferences. (Pl's Motion for Phase II Reply, p. 5).

The answer to the question of whether to have separate trial for litigation and damages is left to the discretion of the trial court based upon the circumstances of the case before it. Fed. R. Civ. P. 42(b); *In re Bendectin*, 857 F.2d 290, 308 (6th Cir. 1988), cert. denied, 488 U.S. 1006 ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."); see also *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978); Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 481 (1995). While separate trials for separate issues in one lawsuit is not usual in large class action suits, a two-phase model has been used to promote efficiency. See *Sterling v. Velsicol*, 855 F.2d

1188 (6th Cir. 1988); *Manual for Complex Litigation*, § 33.28. However, this model has not been used as frequently in RICO litigation, for the liability and damages questions are not so easily divided. *Manual for Complex Litigation*, §§ 33.82, 33.83, 33.86. A motion for bifurcation of the litigation is properly made at the pretrial conference. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 483 (1995); see *Krueger v. New York Telephone Co.*, 163 F.R.D. 446 (S.D.N.Y.1995).

In the present case, the plaintiffs argue that at the discovery stage they first argued for a two-phase trial. In the plaintiffs' Brief in Opposition to Defendants' Motion for Leave to File Interrogatories, the plaintiffs cited several cases that were two-phase class action litigations. See *Robertson v. National Basketball Association*, 67 F.R.D. 691, 700 (S.D.N.Y.1975); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 463 (D. Utah 1972). (Pl's Motion for Phase II Reply, Ex. B). However, these cases were used in the support of the argument that defendants could not obtain discovery of absent class members before the class was certified, not to support an argument for the bifurcation of the case. The plaintiffs did not formally present a motion for a two-phase trial before the court at that time.

The plaintiffs argue that the Notice of Class Determination, approved by this court and sent to all women's health centers in the United States who were potential plaintiff clinic class members, included language that recognized that this litigation would occur in two phases. Part F of the Notice, titled "How to Stay in the Lawsuit," states,

> "After the first phase of the trial, if Plaintiffs prevail, you may be required to provide information or even to testify in a trial or other proceeding designed to establish the amount of damages, if any, that you suffered as a result f the Defendants' acts."

(Pl's Motion for Phase II, Ex. C).

While the notice does leave open the option for a second phase of litigation, the notice in and of itself does not establish

that the court ruled on the issue or that the parties consented to a two-phase trial.

In the Final Pre-Trial Order, the plaintiffs argue that a two phase trial was discussed. In the Plaintiffs' Trial Brief, the plaintiffs argued that damages for the plaintiff clinic class should be determined in a Phase II trial. (Pl's Motion for Phase II Reply, p. 4, citing Pl's Trial Brief, p. 11). Relying on General Rule 5 of the Northern District of Illinois, Standing Order on Pretrial Procedures in Civil Cases, the plaintiffs argue that the trial briefs are incorporated into the Final Pre-Trial Order and are thus binding upon the parties. (Pl's Motion for Phase II Reply, pp. 4-5). The plaintiffs state that the defendants did not object to the Final Pre-Trial Order and this two-phase model for the trial was agreed to by the defendant parties at the Final Pre-Trial Conference.[9]

There are several problems with the plaintiffs' argument. First, the discussion in the Plaintiffs' Trial Brief of a two phase trial was presented only as a "suggestion" to the court and consisted of only one paragraph in a fifteen page brief. The court does not consider that a formal presentation of the issue to the court. While the Plaintiffs' Trial Brief was attached to a draft of the Pre-Trial Order, the Final Pre-Trial Order that was signed and entered did not contain a copy of the Plaintiff's Trial Brief. However, within the signed and entered Final Pre-Trial Order is the statement, "6. The parties do not agree that the issues of

---

[9] The exchange relied upon by plaintiffs to demonstrate that defendants agreed to a two-phase trial occurred at the Final Pre-Trial Conference:

THE COURT: Now, are there any other things that we need to take up?

MS. CLAYTON: Real quick matter. I think it goes without saying that the scope of this trial is the common question of the class action and the damages of the two lead plaintiffs, and other issues of absent class members will be reserved for later. We have never actually said that, but I assume that was the scope of it.

MR. CRAIN: Right.

liability and damages of the class member clinics should be bifurcated for trial." (Final Pre-Trial Order, p. 5). The plaintiffs argue that the language only refers to the two lead plaintiff clinics in the case, Summit and DWHO, but there is no additional language in the Final Pre-Trial Order to support such an argument. All language within the Final Pre-Trial Order is binding on the parties at trial. General Rule 5.00 of the Northern District of Illinois, Standing Order Establishing Pretrial Procedure, Section 6(d). Therefore, the parties did not consent to a two-phase trial.

As to the so-called agreement by defendants to a two-phase trial at the Final Pre-Trial Conference, the answer of "Right" by one of the defense counsel and the silence of other defense counsel to the comment by plaintiffs' counsel on the scope of the trial is not considered consent by this court. The court does not consider that sidebar discussion a formal presentation of the issue of the bifurcation of the trial to the court and the court did not rule on the issue of a two-phase trial at that time.

This court has made it very clear to all parties in this case that issues that affect the proceedings of this case must be placed in writing. (Final Pre-Trial Conference Transcripts, February 20, 1998, pp. 15-16; *supra*, fn. 2). The Federal Rules require it and the history of the proceedings in this case demanded it. The plaintiffs did not make a formal motion to bifurcate this litigation until after trial. A district court does not abuse its discretion when it denies a *sua sponte* motion for bifurcation when the parties did not make a motion for bifurcation prior to trial. *Bunch v. Bullard*, 795 F.2d 384, 390-91 (5th Cir. 1986). Therefore, the plaintiffs' motion in support of Phase II trials is denied.

IV. Injunctive Relief

A continuous issue in this case has been whether plaintiffs are able to petition for injunctive relief under civil RICO. Now that the trial is over and the monetary damages have been determined,[10] the issue of injunctive relief for the plaintiffs is the last issue to be addressed.

A. Injunctive Relief Available under RICO

Section 1964(a) of RICO, entitled "Civil Remedies," states:

> "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

This court found in an earlier opinion in this case that private parties may petition the court for injunctive relief for civil RICO violations. *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995). Granted, the circuit courts are split on this issue. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). The Seventh Circuit also has not ruled on this issue. However, this court is persuaded by the rationale of the opinions of the other circuits. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (finding that in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit);

---

[10] 18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to Summit and DWHO are trebled to $163,413.84 and $94,366.92, respectively.

Humana, Inc. v. Avram A. Jacobson, M.D., P.a., 804 F.2d 1390 (5th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute); see also Batista, Civil RICO Practice Manual 169 (1987), § 6.13 – The Availability of Injunctive Relief. This court also must follow the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

While an injunction may be an option under civil RICO, any possible injunction must pass muster under the First Amendment. The Supreme Court has noted in this very case that, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." 510 U.S. 249, 264 (1994) (J. Souter, concurrence). As this court examines the potential of an injunction, the court will follow the Seventh Circuit's instruction to address, "if necessary, . . . which of the defendants' activities, . . . are protected by the First Amendment to the United States Constitution." *NOW v. Scheidler*, 25 F .3d at 1053.

B. Standard for Injunctive Relief

A party seeking a permanent injunction must show that: 1) it has prevailed on the merits of its claim; 2) it has no adequate remedy under law; 3) the balance of equities tips in its favor, and 4) the issuance of the injunction serves the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Obviously the plaintiffs met the first criteria when the jury returned a verdict finding the defendants liable under civil RICO. (Transcripts, April 20, 1998, pp. 5183-5191). The final three criteria must be examined.

1. No Adequate Remedy Under Law

Since RICO expressly provides for injunctive relief, this factor does not apply, and thus the plaintiffs do not have to show that they lack an adequate remedy under law. When Congress expressly authorizes injunctive relief to enforce provisions of a statute, a party need not show the lack of a adequate legal remedy. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Pepsico, Inc. v. Redmond*, 1996 WL 3965 at *28 (N.D. Ill. 1996); *Special Education Services v. RREEF Performance Partnership-I, L.P.*, 13 A.D.D. 683 (N.D. Ill. 1995); *North Shore- Chicago Rehab. Inc. v. Village of Skokie*, 827 F. Supp. 497, 509 (N.D. Ill. 1993); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 822 (N.D. Ill. 1988); *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1484-85 (N.D. Ill. 1987). The Seventh Circuit has held that for a statutory injunction, "the moving party only needs to show that there is some reasonable likelihood of future violations . . ." *Commodity Future Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). As we shall see below, there is more than adequate evidence to make this showing.

2. Balancing the Equities and Serving the Public Interest

The threatened injury to the two classes of plaintiffs outweighs the potential harm to the defendants by an injunction. The evidence presented both at trial and at the injunction hearing shows that the defendants have a history of unlawful conduct. The jury found that in the last ten years, the defendants committed repeated acts and threats of extortion against patients, prospective patients, and clinic personnel as well as acts and threats of violence to persons and property across the United States. (Transcripts, April 20, 1998, pp. 5187-88). These acts crossed the line of expression into the realm of threatening conduct. The Supreme Court has upheld injunctions against individual protestors and organizations of protestors of reproductive health clinics when there is a history of prior unlawful conduct by the protestors. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 fn. 6 (1997); *Madsen v.*

Women's Health Center, Inc., 512 U.S. 753, 762, 764 fn. 2 (1994). The Court in *Madsen* found that there was a significant governmental interest in the injunction in order to ensure public safety and order, to promote free flow of traffic on the streets and sidewalks, to protect property rights, and to protect a woman's freedom to seek pregnancy-related services. *Madsen*, 512 U.S. at 762. Considering the evidence relied upon by the jury in this case, and the evidence presented to the court in the injunction hearing on the actions of the defendants, the governmental interests are significant enough to justify a tailored injunction.

C. The Necessity of an Injunction in light of FACE

This court held a post-trial hearing to address the issue of whether the passage of FACE has addressed the defendants' conduct and thus has eliminated the need for an injunction in the present case. FACE was passed by Congress in May of 1994. At the hearing, evidence was presented of defendants' illegal activity since the passage of FACE. For example, plaintiffs presented evidence of butyric acid being placed in a reproductive health clinic in Orlando, Florida in May of 1998 during Operation Rescue's national rescue week in Orlando as well as videotape evidence of defendants blocking clinic doors and physically accosting plaintiffs as they attempted to enter a clinic in Chicago in August of 1996. (Transcripts, June 30, 1998, pp. 45-46, 92-95). Evidence was also presented of "lock and blocks" at a clinic in Milwaukee where defendants physically locked their bodies to automobiles that were parked in front of the clinic's doors, making it impossible for clinic staff and patients to enter the clinic. (Transcripts, June 30, 1998, pp. 97-98). These "lock and blocks" have been continuing in Milwaukee on an almost weekly basis since May of 1994. (Transcripts, June 30, 1998, p. 98). Plaintiffs' witnesses testified at the hearing that various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the defendants continues as defendants cross state lines to avoid the jurisdiction of the various injunctions. (Transcripts, June 30, 1998, pp. 55, 73). Moreover, there was testimony supporting the conclusion that blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel. (Transcripts, p. 4091).

This court finds that the defendants, as an enterprise, have continued to engage in illegal behavior that violates civil RICO since the passage of FACE and thus there is a significant governmental interest in ordering an injunction to enjoin such illegal conduct. The injunction should be national in scope, for plaintiffs have shown that injunctions that are geographically limited do not prevent defendants from engaging in illegal conduct. Where the need for an injunction is nationwide, the courts have consistently held that an injunction can and should be nationwide in scope both in the abortion protest context, *United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D.Pa.1996); *United States v. McMillan*, 946 F. Supp. 1254, 1270 (S.C.Miss.1995); as well as in other contexts. *United States v. Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). The Eight Circuit in *United States v. Dinwiddie* upheld a national permanent injunction against an individual anti-abortion protestor. The court in *Dinwiddie* found that not only was there a significant governmental interest in protecting the particular clinic staff and patients involved in the case, but in protecting the staff and patients of other reproductive health facilities throughout the country from the illegal conduct of the defendant. *Dinwiddie*, 76 F.3d at 929. The court recognized that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.*, quoting the district court, 885 F. Supp. 1286, 1296 (W.D.Mo.1995). Considering the evidence of defendants' illegal conduct across the United States, the reasoning of *Dinwiddie* applies squarely to this case.

D. Conduct versus Speech

The defendants argue that an injunction would be a direct ban on protected speech and thus would be unconstitutional.

(Dfts' Memo in Opp. to Inj., pp. 7- 8). However, the Supreme Court has held that there is a distinction between speech and conduct. While speech is constitutionally protected, if the speech is used to threaten, incite or organize criminal acts, the speech loses its protection. *Madsen*, 512 U.S. at 773 (threats are proscribable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech infused with violence are indistinguishable from physical threats); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 386 (1992) (fighting words are not protected by the First Amendment). See also *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998) (an illegal course of conduct is not protected by the First Amendment merely because the conduct was carried out by speech).

The injunction restrains specific behavior of defendants that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, *Schenck*, 519 U.S. at 367 n. 3; *Madsen*, 512 U.S. 759-61; trespassing, *Id.; Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1998); *Roach*, 947 F. Supp. at 878; damaging property, *Portland Feminist*, 859 F.2d at 684; and using violence or threats of violence, *McMillan*, 946 F. Supp. at 1254. The Seventh Circuit has distinguished between conduct and speech in the arena of anti-abortion protesting: "[Physically impeding entry to a reproductive health facility] goes beyond protest and interferes with the personal liberty and property rights of others. While it is expressive conduct, it is not protected by the First Amendment." *Wilson*, 154 F.3d at 663. The injunction still leaves open many avenues for defendants to express their anti-abortion beliefs. For example, the injunction does not enjoin protected actions such as peaceful picketing, public speeches, pamphleting, praying, or sidewalk counseling.[11]

---

[11] See footnote 20, *infra*, for definition of sidewalk counseling.

E. Prior Restraint

The defendants argue that an injunction would be a prior restraint on speech, for it would have a chilling effect upon speech. (Dft's Memo in Opp. to Inj., p. 6). However, the Supreme Court has rejected this prior restraint argument in two cases involving injunctions against anti-abortion protestors. In *Madsen*, the Court held, "[n]ot all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in *New York Times Co. v. United States*, 403 U.S. 713 (1971) or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . buffer zone." 512 U.S. at 764, fn. 2. In *Schenck*, once again the Supreme Court rejected the prior restraint argument, for the injunction left alternative channels of communication open to protestors and the injunction was issued because of the illegal conduct of the defendants, not because of the content of their expression. 519 U.S. at 374, fn. 6. The same is true in this case. The record shows systematic illegal conduct by the defendants against the classes of plaintiffs. The injunction still allows a variety of options for the defendants to express their views. This case is about political means and ends. While the political ends of the defendants-to convince the public of the need to protect what they characterize as "unborn children"-are constitutionally protected by the First Amendment, a number of their means-destroying property and threatening violence-are not.

V. The Injunction

This case has come to the Court on the request of the Certified Plaintiff Classes[12] and the members of NOW whom NOW represents for a Permanent Nationwide Injunction.

The Court having heard the evidence presented at the trial of this case from March 5, 1998 through April 14, 1998, after which a jury ruled in Plaintiffs' favor on all issues; and having heard additional evidence, without any advisory jury, from June 30, 1998 through July 2, 1998;

The Court hereby finds and orders:

1. The Defendants[13] have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., by operating an enterprise, the Pro Life Action Network ("PLAN"), through a pattern of numerous, repeated acts of racketeering that interfered with the Plaintiff Clinics' right to provide medical services, including but not limited to abortions, and the right of NOW members and the Plaintiff Class of women to obtain those services.

2. The evidence presented at trial established a likelihood that similar illegal conduct would be committed in the future by the Defendants and/or others acting in concert with them.

---

[12] The Plaintiff Class of Clinics and the Plaintiff Class of Women are defined in this Court's Order dated March 28, 1997 as follows:

The Clinic Class: The class of all women's health centers in the United States at which abortions are performed.

The NOW Non-Member Class: The class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

[13] Randall A. Terry entered into a Settlement Agreement with Plaintiffs prior to trial. This Order does not apply to him.

The Conduct Enjoined

3. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly: [14]

a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (included but not limited to abortion services), by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic[15];

(2) trespassing on the premises or the private property of any Plaintiff Clinic[16]

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[17]

---

[14] *Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir. 1989).

[15] *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 367 n. 3 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 759-61 (1994).

[16] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 759 (1994); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1988); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D. Penn. 1996).

[17] *Portland*, 859 F.2d at 684 (9th Cir. 1988).

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[18]

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others;[19]

c. operating an enterprise through any of the Acts described above.

4. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;[20]

d. Handing out literature on public property; and

e. Praying on public property.[21]

5. This injunction shall bind Defendants Joseph Scheidler; Andrew Scholberg; Timothy Murphy; the Pro-Life Action League, Inc.; and Operation Rescue, a/k/a Operation Rescue National, and each of their officers, agents, servants, employees and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First

---

[18] *United States v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995).

[19] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 761 (1994).

[20] This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel . . ." *Schenck*, 519 U.S. 357 (1997).

[21] *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

6. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.[22]

Retention of Jurisdiction

7. The Court shall retain jurisdiction to enforce the terms of this injunction for twelve (12) years from the date below.

Conclusion

For the foregoing reasons, Defendants Joseph Scheidler and Operation Rescue's motion for decertification of the two classes is DENIED. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction to be placed upon defendants for a period of twelve (12) years. All other motions are denied as moot. This case is now closed.

---

[22] *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (referring to language of injunction quoted in 885 F. Supp. 1286, 1298 (W.D. Mo. 1995)); *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 29, 2001

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. TERRENCE T. EVANS, Circuit Judge

Nos. 99-3076, et al.

NATIONAL ORGANIZATION FOR WOMEN, INC., *etc., et al.*,
Plaintiffs-Appellees,

v.

JOSEPH M. SCHEIDLER, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 86 C 7888

David H. Coar, *Judge.*

ORDER

On consideration of the petitions for rehearing and rehearing *en banc* filed by Counsel for Defendants-Appellants Scheidler, Scholberg, Murphy & Pro-Life Action League, Inc., and Counsel for Defendant-Appellant Operation Rescue, all members of

the have voted to **DENY** the petitions for rehearing. No judge* in regular, active service requested a vote on the rehearing *en banc*.

Accordingly,

IT IS ORDERED that the petitions for rehearing be, and hereby are, Denied.

---

* Judge Kenneth F. Ripple did not participate in the consideration of these petitions.

APPENDIX E

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any

> person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX F

[Excerpts From Jury Instructions]

* * * *

[Tr. 4938] This lawsuit is brought under the Racketeer Influenced and Corrupt Organizations Act called RICO and state law. The plaintiffs seek injunctive relief and damages from the defendants who allegedly have conspired among themselves and with others through their alleged enterprise, the Pro-Life Action Network or PLAN, to engage in a pattern of illegal activity, which the plaintiffs contend was designed to injure the business and property of clinics where abortions are performed and to deprive women of the right to obtain the services of those clinics.

A woman's – it says women's. It should be woman's. A woman's right to obtain an abortion is not at issue in this [Tr. 4939] lawsuit. The United States Supreme Court already has declared that women have a constitutional right to choose to have an abortion, nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafletting, and participating in the legislative process are activities protected by the First Amendment of the United States Constitution.

What is at issue in this case is whether the defendants engaged in activities that are prohibited by RICO. The fact that it has taken 12 years for this case to come to trial should not concern you.

In this case you have heard testimony relating to incidents of murder, arson, and bombing. There is no claim in this case, however, that the defendants themselves are responsible for any of those acts. An issue has been raised in this case as to the relationship between Operation Rescue and Operation Rescue National. On this issue you are directed that Operation Rescue

and Operation Rescue National are one in the same organization for actions taken in the following times and places:

From July 31st, 1990 through December 1993 in Washington, D.C., the summer of 1991 in Wichita, Kansas; March 1st, 1989 through December 1993 in the Philadelphia, Pennsylvania metropolitan area including Cherry Hill, New Jersey. As to other times and places the issue of the [Tr. 4940] relationship between Operation Rescue and Operation Rescue National is a question for you to decide.

Also you heard testimony from Mr. Keith Tucci denying that he ever – it says never. It should be ever – that he ever observed anyone acting on behalf of Operation Rescue National or Operation Rescue engaged in activity designed to deprive a clinic of property. You are instructed that a Court of the United States has found that Operation Rescue National, Flip Benham, Keith Tucci, Don Treshman, and Rescue America engaged in activity that did deprive a clinic of property in August of 1992 during the Republican National Convention in Houston, Texas.

In this case the plaintiffs must prove every element of their RICO claims by a preponderance of the evidence. A preponderance of the evidence simply means evidence that persuades you that the plaintiffs' claim is more likely true than not true. In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them and all exhibits received in evidence regardless of who may have produced them.

I will instruct you on the plaintiffs' burden of proof with respect to their state law claims when I give you the instructions on those claims. The plaintiffs have made two separate claims that the defendants engaged in activities [Tr. 4941] prohibited by RICO. The first, which I will refer to as Claim 1, is that the defendants committed acts which violate RICO. The second, which I will refer to as Claim 2, is that the defendants conspired to commit acts that would violate RICO. I will instruct you on the elements of each of these claims separately.

Claim 1 RICO violation. In order for you to find that the defendant violated RICO, the plaintiffs must prove by a preponderance of the evidence, 1, that PLAN is an enterprise; 2, that PLAN affected interstate commerce; 3, that the defendant was associated with PLAN; 4, that the defendants' association with PLAN involved operating or managing PLAN; and 5, that the defendant participated in the affairs of PLAN through some pattern of acts illegal under RICO.

I will now instruct you as to each of these elements. From here on in order to avoid repeating myself when I say defendant, that also means more than one defendant. If you find that more than one defendant committed a RICO violation, you may find that one, some, or all the defendants violated RICO. I will now instruct you on each of these elements.

The plaintiffs allege – first element, enterprise. The plaintiffs allege that the Pro-Life Action Network or PLAN is an enterprise with the common purpose of preventing [Tr. 4942] abortion and shutting down clinics that perform abortions. An enterprise is defined as a group of persons or organizations associated together formally or informally for a common purpose of engaging in a course of conduct.

An enterprise requires an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consentual decision making. An enterprise does not have to be a legally recognized entity such as a corporation, and it need not have a formal structure with such things as officers, employees, titles, or bank accounts. Further, it does not matter whether PLAN is organized for a lawful or unlawful purpose or whether its unlawful acts actually benefitted the group.

Second element, interstate commerce. The second element requires that PLAN engaged in or had an effect on interstate commerce. In order to establish this element the plaintiffs must prove by a preponderance of the evidence that PLAN or any of its activities affected interstate commerce. For example, if the defendants or others associated with PLAN used the United

States mail or traveled or made phone calls across state lines while doing any action connected with PLAN regardless of whether these actions were unlawful, then you must find that this element has been met.

Plaintiffs must show that the defendant was associated with PLAN. That is, the defendant must have had [Tr. 4943] some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by other people who were associated with PLAN. If the defendant was associated with PLAN at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with PLAN for the entire time that it existed.

The fourth element, operating or managing an enterprise. The plaintiffs must show that as part of his or its association with PLAN the defendant participated in the operation or management of PLAN or acted at the direction of PLAN's leaders. The defendant need not have been a part of the top management or have held any formal position in PLAN.

The fifth element, pattern of unlawful activity. Plaintiffs must show that the defendant or other people associated with PLAN committed the two or more unlawful acts in any of the following categories in any 10-year period:

1, acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic worker, or clinic. 2, threats of murder against a doctor, nurse, or clinic worker. 3, attempting or conspiring to do any of the acts listed in paragraphs 1, 2 above even if the act was not actually carried out.

[Tr. 4944] 4, acts or threats of physical violence to any person or property. 5, travel across state lines or use of the mails or telephone with the intent to promote, manage, or carry out any act of extortion, arson, or any crimes of violence in violation of state or federal law followed by an act in furtherance of that intent. 6, attempting to travel across state lines or use the

mail or telephone to do acts described in paragraph 5 above. Or 7, causing others to travel cross state lines, use the mail or telephone to do or attempt acts described in paragraph 5 above.

The two or more acts may be from the same category or different categories. I will give you further explanation about some of these categories of unlawful acts in a moment. The plaintiffs must also show that there was some connection between the acts. For example, that they happened as a result of a common scheme, plan, or motive.

Unlawful acts under RICO. I will now instruct you on the elements of certain of the unlawful acts under RICO which the plaintiffs allege that the defendants have violated.

Federal law extortion, Hobbs Act. The plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must [Tr. 4945] show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinic themselves to give up a property right.

The term property right means anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

Fear includes not only fear of physical violence but fear of wrongful economic injury. Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats.

Plaintiffs must also show that the extortion of the defendant or others associated with PLAN affected interstate commerce.

See instruction No. 19 for a definition of interstate commerce. It is sufficient if the acts of extortion were aimed at medical facilities that purchased supplies made in another state or that served patients who came from another state.

[Tr. 4946] If the defendant or someone else associated with PLAN attempted to commit such an act, it is a violation even if the act was not completed.

Definition of a threat. In order for the plaintiffs to establish a threat, they must demonstrate that the defendants or their co-conspirators made a statement or engaged in conduct in a context or under such circumstances wherein a reasonable person would foresee that the statement or conduct would be interpreted by those to whom the maker communicates the statement or conduct as a serious expression of an intention to inflict harm, including bodily harm or wrongful economic harm.

Context as used in this instruction includes the surrounding events and reaction of the listeners. Whether an action or statement is a threat is a matter for you the jury to decide. For example, you have heard evidence about physical blockades at clinics. You must decide whether the act of blockading constituted a threat. You need not find that the defendant or co-conspirator intended to carry out the threat or was even capable of carrying out the threat in order to find that the action or statement was, in fact, a threat.

State law extortion. Plaintiffs have alleged that the defendants and others associated with PLAN committed acts that violate various states' laws against extortion. In [Tr. 4947] order to show that state law extortion has been committed, the plaintiffs must show that the defendant or someone else associated with PLAN intentionally caused women, clinic doctors, nurses, or other staff or the clinics to give up a property right.

The term property right means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services from wrongful threats, violence, coercion, and fear.

Plaintiffs must also show that the defendant or other persons associated with PLAN did this through the use of violence or fear including threats of personal injury, damage to property, or economic interests, or threats to commit other crimes. The threat need not have been actually carried out and the defendant need not have even actually intended to carry out the threat.

If you find that the defendant or another person associated with PLAN committed, attempted, or conspired to commit extortion in certain states, you must also find that the value of the rights involved is as follows:

In Missouri more than $150, in Kansas more than $500, and in Texas more than $1500.

State law attempted extortion. A defendant or [Tr. 4948] another person associated with PLAN committed the unlawful act of attempted extortion under state law if you find that 1, he or she intended to commit extortion; 2, he or she took a substantial step towards committing extortion; and 3, the attempt was accompanied by a threat.

Proximate cause. Finally you must consider whether there was some direct relationship between the wrongful action of the defendant or others associated with PLAN and the injury or harm to plaintiffs' business or property rights, which includes a woman's right to seek medical services from a clinic, the right of doctors, nurses, and other clinic staff to perform their jobs, and the right of the clinics to provide medical services.

An injury or harm is proximately caused when an act plays a substantial part in bringing about or actually causing the injury or harm. In determining whether actions of defendant or someone else associated with PLAN proximately caused the injury or harm to the plaintiffs, you may consider the various unlawful acts under RICO discussed above and any overt act taken in furtherance of PLAN's goals.

Threat of murder. Although plaintiffs do not allege that the defendants committed murder, they do allege that the defendants and others associated with PLAN have threatened murder against doctors and clinic staff members. Murder is the killing

of a human being if it was done 1, intentionally [Tr. 4949] and with premeditation; or 2, unintentionally but recklessly under circumstances showing extreme indifference to the value of human life.

The defendants' liability for acts of others. Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

Claim 2, RICO conspiracy. Plaintiffs have also alleged that each defendant engaged in a conspiracy to violate RICO. This means that a defendant agreed with one or more other persons that defendants or others associated with PLAN would engage in acts that violate RICO. A person may be liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no unlawful acts were actually committed.

If you have found all the defendants liable under Claim 1, then you need not consider this second claim. However, if you have found any defendant not liable under Claim 1, then you should consider whether that defendant agreed with any other person or organization to violate RICO.

[Tr. 4950] Agreement. To prove liability for conspiring to violate RICO, the plaintiffs must prove that the defendant knowingly became associated with PLAN and agreed with another person to operate and manage PLAN through a pattern of racketeering activity. You do not need to find that the defendant agreed to personally commit unlawful acts under RICO. People or groups who are associated with the RICO enterprise may agree to divide up the work, and each person who agrees to operate or manage an enterprise through a pattern of unlawful acts under RICO may be liable even if he intended that someone associated with the enterprise would carry out the unlawful acts.

Once a defendant agrees with a co-conspirator that PLAN would engage in RICO violations, that defendants is responsible for the previous acts of the conspiracy as well.

Multiple conspiracies. You must determine whether a single conspiracy existed between two or more conspirators. If you find that no such conspiracy existed, then you must return a verdict in favor of the defendants on this count. Proof of several separate conspiracies does not prove that a single overall conspiracy existed. While the parties to the agreement must know of each other's existence, they need not know each others' identity nor need there be direct contact.

The agreement may continue for a long period of time and include the performance of many transactions. New [Tr. 4951] parties may join the agreement at any time, while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies. The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times.

Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with those co-conspirators and others to achieve a common goal may be members of an overall conspiracy. In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

If you decide that such a conspiracy did exist, you must determine whether the defendants were members of that conspiracy. If you should find that a particular defendant was a member of some other conspiracy but not the one alleged, then you must return a verdict in favor of that defendant.

The First Amendment. The First Amendment to the [Tr. 4952] Constitution permits persons to join with others to express a particular viewpoint. In public debate, speech including conduct is protected by the First Amendment. This may be so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot. The First Amendment even protects speech that is insulting or even outrageous.

You have heard evidence of speeches made by some of the defendants and have read some of their writings. Some of those speeches and writings contain strong and emotional language. Mere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing unless the words used may be used to incite imminent unlawful conduct that, in fact, followed within a reasonable period.

Speeches and writings may be taken, however, as evidence that the defendants or the enterprise gave other specific instructions to carry out violent acts or threats.

Threats to patients, owners or operators of clinics, clinic staff including doctors and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment. Destruction of property is not protected by the First Amendment. The protection of the [Tr. 4953] First Amendment does not extend to joining together to deprive others of their lawful rights.

Damages. In considering the issue of damages, if any, with respect to the RICO claim you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the damages to the plaintiff and its business or property, no more and no less. Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that you are to determine.

You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded to a plaintiff under his RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim without regard to the damages, if any, you might award under any other claim.

Damages for personal injury such as pain and suffering, emotional suffering, humiliation, and mental anguish are not recoverable under RICO. You should not award damages for any personal injuries or harm derived from personal injuries.

[Tr. 4954] During the trial of this case ceratin testimony has been presented to you by way of deposition consisting of sworn recorded answers to questions asked of a witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of the witness who for some reason cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, weighed, and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand. All persons are equal before the law.

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be dealt with as equals in a court of justice.

Although there are more than one plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover all are entitled to recover. The defendants are entitled to a fair consideration of their defense as to each plaintiff, just as each plaintiff is [Tr. 4955] entitled to a fair consideration of

its claim against each defendant. Unless otherwise stated, all instructions given you govern the case as to each plaintiff.

Multiple defendants. Although there are five defendants in this action, it does not follow from that fact alone that if one is liable all five are liable. Each defendant is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against any of the others. Unless otherwise stated, all instructions given to you govern the case as to each defendant.

* * * *

[Tr. 4957] Now, ladies and gentlemen, accompanying the verdict form are what we call special interrogatories. They are questions directed to you as a jury. They must be answered by you as a group. You are to answer these questions and return them with the verdict form.

* * * *

APPENDIX G

[*Special Interrogatories and Verdict Form*]

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (see Jury Instruction No. 20 for the definition of "associated with")

Joseph Scheidler Yes ✓ No ___

Andrew Scholberg Yes ✓ No ___

Timothy Murphy Yes ✓ No ___

Pro-Life Action League Yes ✓ No ___

Operation Rescue Yes ✓ No ___

3. Did the following Defendants participate in the operation management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

Joseph Scheidler Yes ✓ No ___

Andrew Scholberg Yes ✓ No ___

Timothy Murphy Yes ✓ No ___

Pro-Life Action League Yes ✓ No ___

Operation Rescue Yes ✓ No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	

(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	
(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

Yes ✓ No ____

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely blockades of clinic doors or sit-ins within clinics, without more?

Yes ____ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No ____

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ____

9. If any defendant or person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ____

Delaware Women's Health Organization:

Yes ✓ No ____

Summit Women's Health Organization:

Yes ✓ No ____

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ 54,471.28

Delaware Women's Health Organization $ 31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler Yes ____ No ____

Andrew Scholberg Yes ____ No ____

Timothy Murphy Yes ____ No ____

Pro-Life Action League Yes ____ No ____

Operation Rescue Yes ____ No ____

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ _____

Delaware Women's Health Organization $ _____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

_____ _____

Date Foreperson

_____ _____

Juror Juror

_____ _____

Juror Juror

_____ _____

Juror Juror

Supreme Court, U.S.
FILED
MAR 4 2002
CLERK

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

-and-

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY
& CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Attorneys for Respondents

172667

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

4819

QUESTIONS PRESENTED

1. Whether to use ambiguous legislative history to restrict the permanent injunction remedy provided by § 1964(a) of RICO to only the government, where the plain language of the statute does not limit the RICO plaintiffs who may use § 1964(a).

2. Whether to overturn decades of Hobbs Act precedent and to restrict the Act to only those cases where the property can be tangibly "received," and to do so in a case where (a) Petitioners *did* seek to obtain control over Respondents' property, namely, their right to make business decisions free of wrongful force, and (b) even if the Hobbs Act findings were in error, the error would be harmless based on scores of other predicate crimes.

3. Whether giving a unified jury instruction incorporating all the requisite elements of the extortion laws of each pertinent state, and to which Petitioners failed to make any specific objection at trial, was reversible error, where there are two other categories of predicate crimes that are unchallenged and alone are sufficient to support Petitioners' liability.

4. Whether the jury instructions as applied to the facts of this case violated the dictates of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where those instructions and the Verdict Form (1) prohibited the jury from finding Petitioners liable unless Petitioners (a) knew about their enterprise's predicate crimes under RICO, and (b) held a specific intent to further those crimes; (2) required that the enterprise authorize or ratify the predicate crimes; and (3) required that any damages assessed by the jury result proximately from those predicate crimes; and where both the trial court, under Rule 52(a), Fed. R. Civ. P., and the Seventh Circuit, after its own plenary review, found *Claiborne*'s exacting standards had been satisfied.

RULE 29.6 STATEMENT

Respondents National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc. d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc. d/b/a Delaware Women's Health Organization do not have any parent corporations and do not issue stock to the public.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Statement	1
Argument	6
I. There Is No Need to Address the RICO Issue	7
A. No Circuit Split	7
B. The Seventh Circuit's Textual Analysis Is Correct	9
1. No Limitation on Parties Who May Use § 1964(a)	9
2. Petitioners' Antitrust Analogy	11
3. Conflation of Rights of Action with Remedies	11
C. Legislative History	12
D. No Practical Need to Resolve this Issue	14

Contents

	Page
II. There Is No Hobbs Act Issue Requiring the Court's Review	15
A. Improper Vehicle	15
B. No Circuit Split	16
1. Intangible Rights	16
2. Intangible Property Rights Versus "Ethereal" Rights	18
3. No Split with the First or Second Circuit	19
4. The Panaro Dicta	20
C. *Enmons*	21
D. Federalism	23
III. There Is No Reason to Grant a Writ on the State Extortion Instruction	23
A. Improper Vehicle	23
B. Petitioners' Waiver	24
C. The State Extortion Instruction Was Correct	25
IV. This Case Does Not Present the First Amendment Issues Petitioners Raise	26

Contents

	Page
A. No Unsettled Issue	26
B. The Vicarious Liability Instructions	27
C. Crimes, Not Peaceful Acts	28
D. The Seventh Circuit's Plenary Review	29
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Adarand Constructors, Inc. v. Mineta,
122 S. Ct. 511 (2001) 23

Airlines Reporting Corp. v. Barry,
825 F.2d 1220 (8th Cir. 1987) 8

Alexander v. Sandoval,
532 U.S. 275 (2001) 12

Ashland Oil, Inc. v. Gleave,
540 F. Supp. 81 (W.D.N.Y. 1982) 10

Associates Commercial Corp. v. Rash,
520 U.S. 953 (1997) 13

Beck v. Prupis,
529 U.S. 494 (2000) 29

Beck v. Washington,
369 U.S. 541 (1962) 25

Bell v. Hood,
327 U.S. 678 (1946) 15

Bennett v. Berg,
710 F.2d 1361 (8th Cir.), cert. denied, 464 U.S. 1008 (1983) 8

Page

Best Life Assurance Co. of California v. Commissioner,
No. 00-71082, 2002 U.S. App. LEXIS 2190 (9th Cir. Feb. 11, 2002) 20, 21

Bolin v. Sears, Roebuck & Co.,
231 F.3d 970 (5th Cir. 2000) 8, 10

Bose Corp. v. Consumers Union, Inc.,
466 U.S. 485 (1984) 6, 26, 29, 30

Califano v. Yamasaki,
442 U.S. 682 (1979) 14, 15

California v. American Stores Co.,
495 U.S. 271 (1990) 9, 11, 12

Carpenter v. United States,
484 U.S. 19 (1987) 16, 18

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 14

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 11

City of Springfield, Massachusetts v. Kibbe,
480 U.S. 257 (1987) 23

Cleveland v. United States,
531 U.S. 12 (2000) 19

Cited Authorities

Page

Dan River, Inc. v. Icahn,
701 F.2d 278 (4th Cir. 1983) 8, 10

Duncan v. Walker,
533 U.S. 167 (2001) 11, 12

Federal Trade Comm'n v. World Travel Vacation Brokers, Inc.,
861 F.2d 1020 (7th Cir. 1988) 25

In re Fredeman Litigation,
843 F.2d 821 (5th Cir. 1988) 8

Ganey v. Raffone,
91 F.3d 143, 1996 WL 382278 (6th Cir. July 5, 1996) 8

Harte-Hanks Communications, Inc. v. Connaughton,
491 U.S. 657 (1989) 29, 30

Imagineering, Inc. v. Kiewit Pacific Co.,
976 F.2d 1303 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993) 8

Jett v. Dallas Independent School District,
491 U.S. 701 (1989) 11

Johnson v. Collins Entertainment Co.,
199 F.3d 710 (4th Cir. 1999) 8

Knox v. Indiana,
93 F.3d 1327 (7th Cir. 1996) 24

Cited Authorities

Page

Libertad v. Welch,
53 F.3d 428 (1st Cir. 1995) 18, 19, 20

Lincoln House, Inc. v. Dupre,
903 F.2d 845 (1st Dist. 1990) 8

Martin v. Hadix,
527 U.S. 343 (1999) 14

McNally v. United States,
483 U.S. 350 (1987) 18

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,
453 U.S. 1 (1981) 11

Miksis v. Howard,
106 F.3d 754 (7th Cir. 1997) 27

Miller v. French,
530 U.S. 327 (2000) 12, 13

Minnesota v. Northern Securities Co.,
194 U.S. 48 (1904) 11

Monessen Southwestern Ry. Co. v. Morgan,
486 U.S. 330 (1988) 25

Monterey Plaza Hotel Limited Partnership v. Local 483 of Hotel Employees,
215 F.3d 923 (9th Cir. 2000) 19

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) ..... i, 3, 6, 26, 27, 29, 30

Page

NOW v. Scheidler,
510 U.S. 249 (1994) 22

Nakash v. Superior Court,
241 Cal. Rptr. 578 (Cal. Ct. App. 1987) 8

National Railroad Passenger Corp. v. National Association of Railroad Passengers,
414 U.S. 453 (1974) 11

New York v. Operation Rescue National,
273 F.3d 184 (2d Cir. 2001) 30

Northeast Women's Center, Inc. v. McMonagle,
868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989) 8, 18

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.,
185 F.3d 957 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000) 7

Palmer v. Hoffman,
318 U.S. 109 (1943) 24

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 14

Ratzlaf v. United States,
510 U.S. 135 (1994) 13

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 7, 8, 9, 10, 12, 13, 14

Page

Rhode Island Laborers Health & Welfare Fund v. Philip Morris, Inc.
99 F. Supp. 2d 173 (D.R.I. 2000) 10

Richardson v. United States,
526 U.S. 813 (1999) 29

Rotella v. Wood,
528 U.S. 549 (2000) 12

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 10, 12

Solid Waste Agency v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 14

Spanish Action Committee v. City of Chicago,
766 F.2d 315 (7th Cir. 1985) 24

Stirone v. United States,
361 U.S. 212 (1960) 23

Town of West Hartford v. Operation Rescue,
915 F.2d 92 (2d Cir. 1990) 8, 19

Trane Co. v. O'Connor Securities,
718 F.2d 26 (2d Cir. 1983) 8

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 11

USACO Coal Co. v. Carbomin Energy, Inc.,
689 F.2d 94 (6th Cir. 1982) 8

Page

United States v. Anderson,
716 F.2d 446 (7th Cir. 1983) 22

United States v. Arena,
180 F.3d 380 (2d Cir. 1999), cert. denied,
531 U.S. 811 (2000) 7, 18, 19

United States v. Barber,
476 F. Supp. 182 (S.D. W. Va. 1979) 8

United States v. Cerilli,
603 F.2d 415 (3d Cir. 1979), cert. denied,
444 U.S. 1043 (1980) 21

United States v. Culbert,
435 U.S. 371 (1978) 23

United States v. Debs,
949 F.2d 199 (6th Cir. 1991), cert. denied,
504 U.S. 975 (1992) 18, 21

United States v. Enmons,
410 U.S. 396 (1973) 21, 22

United States v. Estate of Romani,
523 U.S. 517 (1998) 14

United States v. Frazier,
560 F.2d 884 (8th Cir. 1977), cert. denied,
435 U.S. 968 (1978) 16

United States v. Gonzales,
520 U.S. 1 (1997) 12

Page

United States v. Green,
350 U.S. 415 (1956) 16, 23

United States v. Hoelker,
765 F.2d 1422 (9th Cir. 1985), cert. denied,
475 U.S. 1024 (1986) 21

United States v. Lewis,
797 F.2d 358 (7th Cir. 1986), cert. denied,
479 U.S. 1095 (1987) 17

United States v. Mitchell,
463 F.2d 187 (8th Cir. 1972), cert. denied,
410 U.S. 969 (1973) 22

United States v. Nadaline,
471 F.2d 340 (5th Cir. 1973), cert. denied,
411 U.S. 951 (1973) 16

United States v. Nardello,
393 U.S. 286 (1969) 24, 25

United States v. O'Malley,
796 F.2d 891 (7th Cir. 1986) 25

United States v. Panaro,
266 F.3d 939 (9th Cir. 2001) 20, 21

United States v. Santoni,
585 F.2d 667 (4th Cir. 1978), cert. denied,
440 U.S. 910 (1979) 16

United States v. Starks,
515 F.2d 112 (3d Cir. 1975) 22

Page

United States v. Stephens,
964 F.2d 424 (5th Cir. 1992) 17

United States v. Stillo,
57 F.3d 553 (7th Cir.), cert. denied, 516 U.S.
945 (1995) 17

United States v. Sturm,
870 F.2d 769 (1st Cir. 1989) 23

United States v. Tropiano,
418 F.2d 1069 (2d Cir. 1969), cert. denied,
397 U.S. 1021 (1970) 16, 17, 18

United States v. Zappola,
677 F.2d 264 (2d Cir.), cert. denied, 459 U.S. 866
(1982) 21

United States v. Zemek,
634 F.2d 1159 (9th Cir. 1980), cert. denied,
450 U.S. 916 (1981) 21

Victor v. Nebraska,
511 U.S. 1 (1994) 25

Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.,
221 F.3d 924 (6th Cir. 2000) 8

Page

Statutes:

15 U.S.C. § 4 11

15 U.S.C. § 26 11

15 U.S.C. § 1951 20

18 U.S.C. § 1952 25

18 U.S.C. § 1961 25

18 U.S.C. § 1964 ..... i, 7, 9, 10, 11, 12, 13, 14

Wis. Stat. § 943.30(1) 24

Miscellaneous:

Blakey and Cessar, *Equitable Relief Under RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?*,
62 Notre Dame L. Rev. 526 (1987) 13, 19

NOW v. Scheidler,
No. 92-780, 1993 WL 459767 10

NOW v. Scheidler,
No. 92-780, 1993 WL 757635 17

ABBREVIATIONS KEY

Pet. App. – Appendix of Petitioner Operation Rescue

PX – Respondents' Exhibits at Trial (Plaintiffs' Exhibits)

RA – Respondents' Appendix in the Seventh Circuit (Appendix to Plaintiffs-Appellees' Brief)

R – Record in the Seventh Circuit

T – Trial Transcript in the District Court

STATEMENT

The trial court found and the Seventh Circuit affirmed that Petitioners were all "high-level leaders" and organizers of the RICO enterprise, Pro-Life Action Network ("PLAN"),[1] Pet. App. 23a; and each personally coordinated and participated in PLAN's crimes. Their objective was "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences" and put the clinics out of business through a pattern of crimes involving the wrongful use of force, violence and fear. Pet. App. 3a, 23a, 238a-39a; T3938.

Petitioners are not the non-violent "political protestors" of their petitions. They vowed to stop abortions "in every way possible," RA181, and their hallmarks were "blitzes" and the "year of pain and fear." T4006-07; Pet. App. 240a-41a, 265a. They declared, "You can try for 50 years to [stop abortion] the nice, polite way . . . or you can do it next week the *nasty* way."[2] RA187. In contrast to non-violent abortion opponents, like the National Right-to-Life Committee, which they belittled as "wimps," "closet activists" and "lily-pads for life," *e.g.* T1511-12, 3936, 4144; PX801 at 13, Petitioners were responsible for 121 predicate crimes against the Respondent women's health centers and their patients. The trial court found there was "more than adequate evidence" that Petitioners' violence would continue even after passage of the Freedom of Access to Clinic Entrances Act ("FACE"), unless an injunction was issued to restrain it. Pet. App. 260a-67a.

---

1. The enterprise, PLAN, shared headquarters with Petitioner Pro-Life Action League, Inc. ("PLAL"). RA224. All three individual Petitioners were directors of PLAL and leaders of PLAN. Petitioner Scheidler was PLAN's Regional Director. These Petitioners are jointly referred to as "Scheidler" herein. One former defendant, Randall Terry, settled with Respondents before trial, agreeing to a more stringent form of injunctive-style relief than the injunction entered here. R1046-47. Petitioner Operation Rescue ("OR") was established by PLAN and was originally led by Terry. Pet. App. 3a, 23a; T4085-86.

2. Emphasis in quoted material has been supplied.

The evidence proved Petitioners organized and executed scores of clinic invasions and blockades involving assaults on doctors and patients to compel the clinics to cease providing lawful medical services and to deter their patients from doing business with the clinics. Not all the women victimized by PLAN sought abortions; they sought a wide variety of medical products and services, including contraceptives, cancer screening, post-operative gynecological care, fertility treatment and annual physicals. Pet. App. 235a-37a; T1387,1515-26, 1535, 1913-15, 4148-49. Petitioners, and the PLAN members they trained and directed, carried out assaults across the country to force clinics to close and patients to give up favorite doctors out of fear of PLAN's violence. T1912-18.

As examples, in Los Angeles, Petitioners and fellow PLAN members beat a post-operative ovarian surgery patient over the head with their anti-abortion sign, knocking her unconscious and causing her to bleed from the sutures in her abdomen. T1519-24. In Cherry Hill, New Jersey, they grabbed a clinic administrator by her hair and threw her to the sidewalk. T4814-31. In Atlanta, they seized a clinic administrator by the throat, choking and bruising her. T1551-52. In Milwaukee, they pulled a doctor by her leg to prevent her from entering the clinic and shoved her against her car. T1705-06. In Chico, California, they smashed clinic staff members against the clinic for hours, bruising them and damaging the glass door. T1441-46. In Pensacola, they assaulted a clinic staff member and volunteer by slamming them against the stairs, sending them to the hospital and leaving one with permanent injuries; meanwhile, they "trashed" the clinic, destroying medications and equipment. T1150, 1470-73, 4013-26; RA183, 184. They vandalized Respondent Delaware Women's Health Organization ("DWHO"), T662-63, and later came back to "case the place" and threaten the administrator with reprisals if she didn't leave her job. T1153-58. In Wichita, after forcing the clinics closed for weeks by massive "human chains," when federal marshals arrived to help patients enter the clinic, they grabbed and bruised the women as they passed through the corridor the marshals

opened. T766-77. Throughout the country, they rocked and beat on patients' cars, T771, 1520-22, 1914; they stalked doctors, clinic administrators and their family members, and laid siege to their vehicles and homes. T1707-09, 1715, 4120-22; they assaulted police officers who tried to protect the clinics, T1596-97; they dismantled surgical equipment, and contaminated surgical instruments and medications, T1150; they conducted "lock-and-blocks," utilizing Kryptonite locks, leg shackles, chains, cement blocks, "junker" cars and other devices to make clinics inaccessible. T1189, 1209, 1707, 2315-32, 2335, 3657-61. They used whatever force was necessary to keep clinics closed and to make patients give up and turn away. Throughout their 14-year siege of clinics across the country, they "cased" clinics to "let them know that they [were] vulnerable." T3930, 4036; PX640. They also repeatedly threatened Respondents that if they did not surrender their rights to do business with one another, they risked being targeted for PLAN's "blitzkrieg tactics." *E.g.*, Pet. App. 265a; RA196-206; T4008.

There was no infringement on protected advocacy or association; the jury entered unanimous verdicts against Petitioners only after being charged with *Claiborne*-based instructions, many drafted by Petitioners themselves. Special interrogatories required the jury to specify whether each Petitioner operated or managed PLAN, with knowledge of PLAN's crimes, with specific intent, through a pattern of predicate crimes, each involving the unlawful use of fear, force or violence. RA62-76. Each Petitioner was responsible for the crimes presented to the jury. In addition to being high-level leaders who organized PLAN's crimes, Petitioners personally trained and directed PLAN's members and volunteers, and carried out crimes personally.

For example, Scheidler organized and participated in the Pensacola clinic invasion, where PLAN leaders agreed who would invade through which door, who would destroy equipment and who would leave before the police came to avoid arrest while others laid siege to the clinic. T4013-26. After two

clinic workers had been sent to the hospital and two PLAN leaders had been jailed, Scheidler and PLAL bragged about how they "had a glorious time in Pensacola, Florida, last week. Shut down an abortuary for a couple of days by dismantling the suction machine." PX670. Giving special praise to Joan Andrews, a long-time PLAN member, T4024, who went to jail for the attack, Scheidler and PLAL announced, "Joan Andrews was superb and really put the old aborters out of business for a spell." PX674. All the individual Petitioners served as blockade "marshals," using bullhorns and other means to direct PLAN members what to do, often physically barring the doors themselves. T772, 1382, 1698-99, 2369, 4095-97, 4101, 4111. Murphy was a primary leader of PLAN's lock-and-blocks, teaching PLAN members how to physically prevent clinics from opening; he carried out the lock-and-blocks with Scheidler's and Scholberg's express endorsement. T2311-20, 4101; Pet. App. 23a. Scheidler was part of the group that invaded the DWHO clinic, threatened the administrator and "cased the place." T1153. They sent threatening letters on their own letterhead, and personally signed them. Pet. App. 23a. Each Petitioner was active on PLAN's Leadership Council, which determined PLAN's illegal tactics. The Seventh Circuit found that "[p]laintiffs presented more than enough evidence to convince us that the individual [Petitioners] actively intended to further PLAN's illegal goals." Pet. App. 23a.

Petitioners claimed they were "non-violent," but they used the term "non-violent" to include "entering the [clinic], sitting in, blocking the entrance or blocking passages leading to the [operating rooms]." T4010. In Petitioners' vocabulary, "non-violence" even included arson and bombing: bombings are "in no way terroristic," T3953-54; "I find [the clinic bombings] no burden at all," RA212; and "I hardly think [bombing] is violence, since it is against bricks and glass. . . ." RA185; T3953-54. They repeatedly declared, "I believe in the use of force." T1910. The trial judge recognized Petitioners

consciously used words with double meanings to create fear, especially in the context of bombings.[3] T4531-32.

In 1987, Petitioners renamed their invasions and blockades "rescues," T4042-43, but they defined rescue as: "Making [a clinic] inaccessible . . . by placing our bodies around it, in it, somewhere on the premises so that [women] cannot get in . . . or it could include . . . our bodies and our cars, our bodies and Kryptonite locks, [or] our bodies and chains." RA169. No mere "interference" sufficed; the wrongful use of fear, force or violence was required for liability. RA69-70, 72.

PLAN united some 300 self-described "radical" anti-abortion groups. RA210; PX208, 646. At PLAN meetings, Petitioners taught tactics like the lock-and-block. Pet. App. 238a-40a; RA138, 187, 196. According to the jury instructions, had Petitioners operated independently rather than through PLAN, they would not have formed an enterprise cognizable by RICO. Had PLAN not resorted to unlawful force, Petitioners would not have been liable for predicate crimes.

The two Respondent clinics incurred extraordinary expenses to repair the damage and protect their patients, staff and property, *e.g.*, T2007, 2019. They sought and were awarded $85,926.92, the cost of repairs and expenses proximately caused by Petitioners' predicate acts, which was trebled under § 1964(c).

The unanimous jury verdict specifically found 21 Hobbs Act extortion-based crimes, 25 state extortion crimes and 25 attempts to violate either the Hobbs Act or state extortion laws. It also found 23 Travel Act crimes, plus 23 attempts to violate that Act, and 4 violations of the Hobbs Act through acts or threats of physical violence, none of which are challenged here.[4]

3. The trial court excluded all evidence that was not closely tied to Petitioners. On that basis, Respondents were not allowed to show Petitioners' links to arson and murder. T10-90 (02/27/98).

4. Scheidler acknowledges these RICO predicate acts (at 5 n.3), but OR errs (Pet. 4 n.5) in ignoring the "physical violence" crimes. *See* Pet. App. 311a-12a (Question 4(e)); RA67. Both Petitioners unsuccessfully challenged these findings in the court below, but neither challenges them here.

ARGUMENT

Petitioners come to this Court (1) having been found by a unanimous jury to have committed 121 predicate crimes under RICO (only 71 of which are challenged here), (2) having been adjudicated racketeers by the trial judge, (3) having lost their numerous post-trial motions,[5] (4) having lost their appeals in every regard in the Seventh Circuit, and (5) having had their petition for rehearing *en banc* denied by the Seventh Circuit without dissent. Petitioners postulate circuit splits involving RICO, the Hobbs Act, state extortion laws, and the First Amendment, but there are no true splits in the circuits and none that warrants this Court's attention. At most, there is some lower court *dicta* that differs from the Seventh Circuit's holding. Moreover, the extortion-related issues Petitioners pose are not material to the correctness of the liability determinations, and the practical import of these issues is diminished by recent federal legislation. None of the issues Petitioners raise is likely to recur.

The only disagreement Petitioners offer on the RICO injunction issue is between 16-year-old *dicta* of the Ninth Circuit and the recent Seventh Circuit holding. As for the Hobbs Act issue, for decades the courts have consistently held the Act protects intangible property, including the right to do business free of wrongful force. With regard to the unified state extortion instruction, the issue is not material to Petitioners' liability, no other circuit has ever reviewed such an instruction, and Petitioners waived this issue by failing to object at trial. Finally, Petitioners' First Amendment issues are fact-bound, and this Court's guidance is not required; moreover, the Seventh Circuit faithfully followed *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and independently reviewed the record, as required by *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984). None of these issues is sufficiently compelling to

5. OR implies their Rule 60(b) motions had merit, OR Pet. 7 n.10, but the motions were so baseless that they were either withdrawn by Petitioners or denied by the trial court and the denial affirmed on appeal. Pet. App. 37a-38a.

warrant the Court's attention. Indeed, this Court has denied *certiorari* on the RICO and Hobbs Act issues repeatedly. *E.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000).

Significantly, Petitioners do not challenge the *scope* of the injunction, which does not restrict peaceful picketing, leafletting or speech, Pet. App. 271a-72a, nor do they challenge the predicate acts involving physical violence under the Hobbs Act, or the Travel Act violations. Likewise, they do not challenge the sufficiency of the evidence. Because the unchallenged predicate acts alone are sufficient to support liability, this case is an improper vehicle for review of Petitioners' extortion issues, as they would not change the outcome.

I. There Is No Need to Address the RICO Issue

A. No Circuit Split. Petitioner OR, at 12, correctly states "the decision below stands alone." Since RICO's enactment in 1970, only one circuit has had to decide whether private plaintiffs may seek permanent injunctions under RICO: the Seventh Circuit in *NOW v. Scheidler*. This unique case raises no issue in need of this Court's resolution. Only one other circuit – the Ninth – has had to decide the availability of injunctive relief of *any* type under RICO. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). There, the Ninth Circuit tackled a far more difficult question: whether RICO allows *interim* injunctive relief. (As shown at 9-10 below, the text of § 1964(b) appears to limit *interim* injunctive remedies to the government, while the *permanent* injunction remedies available under § 1964(a) have no such limitation.) The Ninth Circuit's discussion was just *dicta* as to permanent injunctive relief because the issue before it was merely whether to affirm a preliminary injunction barring a spin-off church from disclosing Scientology materials. 796 F.2d at 1077, 1081 n.6. (Scheidler concedes, at 9, that *preliminary* relief is only a "related question" to the one on which they seek a writ.) Thus, there is no circuit split and certainly no split of any true importance.

Petitioners also overstate the "disarray" in the circuits. While a few have opined about whether such injunctions might be available in a proper case, this is not an issue that has troubled the circuits. Until *NOW*, all the discussions have been *dicta*.[6] The availability of private permanent injunctions has rarely been addressed, for a variety of reasons: (1) there were alternative bases for the relief;[7] (2) essential prerequisites were absent;[8] or (3) only *interim* relief was at issue.[9]

---

6. Assuming availability: *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 (5th Cir. 2000); *United States v. Barber*, 476 F. Supp. 182, 189 (S.D. W. Va. 1979). Doubting availability: *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983). Noting it is an open question: *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 96 (6th Cir. 1982). (Petitioners' *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924 (6th Cir. 2000), was not a RICO case.)

7. *E.g.*, *Airlines*, 825 F.2d at 1223 (state law).

8. *E.g.*, *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Dist. 1990) (no likelihood of success on the merits); *Trane*, 718 F.2d at 28 (no irreparable harm); *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (no defendant enterprise distinction), cert. denied, 464 U.S. 1008 (1983); *Oregon Laborers*, 185 F.3d at 966 (no standing); *Dan River*, 701 F.2d at 290 (claim failed balance of hardships); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (no standing), cert. denied, 507 U.S. 1004 (1993); *Johnson v. Collins Entm't. Co.*, 199 F.3d 710, 727 (4th Cir. 1999) (court had to abstain); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 93 (2d Cir. 1990) (no standing); *Ganey v. Raffone*, 91 F.3d 143, 1996 WL 382278 (6th Cir. July 5, 1996) (arbitrators did not enter injunction, therefore court lacked power to do so). Even Petitioners' state court case found the question premature. *Nakash v. Superior Court*, 241 Cal. Rptr. 578, 585 (Cal. Ct. App. 1987).

9. *Wollersheim*, 796 F.2d at 1079 (preliminary injunction); *Fredeman*, 843 F.2d at 828 (interim asset freeze); *Airlines*, 825 F.2d at 1221 (preliminary injunction); *Lincoln House*, 903 F.2d at 848 (interim asset freeze); *Trane*, 718 F.2d at 27 (preliminary injunction); *Dan River*, 701 F.2d at 280 (preliminary injunction).

Because the Seventh Circuit is the first circuit in RICO's 32-year history required to decide whether private plaintiffs may obtain permanent injunctions after judgment, the Court should await further deliberation below, if the issue ever again arises.[10] Since there is no conflict in need of resolution, it would be beneficial to allow the issue to percolate through the courts of appeal rather than reviewing the issue the first time it arises.

B. The Seventh Circuit's Textual Analysis Is Correct.

1. No Limitation on Parties Who May Use § 1964(a). RICO's § 1964(c) gives parties who are injured in their business or property the right to sue, and § 1964(a) gives district courts jurisdiction:

> to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including but not limited to: . . . imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . . .

There is no textual restriction on who may seek this relief.

As this Court explained in *California v. American Stores Co.*, 495 U.S. 271, 295 (1990), when a statute's text does not restrict the relief a party may seek, it is assumed Congress intended equitable provisions to govern. The Seventh Circuit properly applied that rule to the statute here. RICO's only source of *permanent* injunctions is § 1964(a), which unambiguously allows such relief. *See* Pet. App. 10a; *Wollersheim*, 796 F.2d at 1083. A plain, straightforward reading of § 1964(a) shows no restrictions on the parties who may use it. Pet. App. 9a. By contrast, § 1964(b)[11]

---

10. Although Petitioners' violence continued after FACE was enacted, FACE makes RICO's future application in this context unlikely.

11. Section 1964(b) provides: "The Attorney General may institute proceedings under this section. . . . *Pending final determination* thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."

applies only to *interim* relief sought by the government, as Scheidler concedes at 11. The Seventh Circuit explained that because RICO's § 1964(b) expressly grants the *government* the right to seek *interim* remedies, with no reference to private plaintiffs, one could conclude that interim remedies are available to only the government. Pet. App. 10a, *see also Dan River*, 701 F.2d at 290.[12]

Scheidler's brief to this Court in 1993 conceded that with regard to private plaintiffs injured in their business or property, permanent injunctions are proper: "RICO civil remedies are set out at 18 U.S.C. § 1964. *While they include injunctions*, RICO's most distinctive civil remedy is . . . treble damages. . . ."[13] Scheidler Rspt's Br. in *NOW v. Scheidler*, No. 92-780, 1993 WL 459767, at *17. Although Scheidler now tries to retract his admission that RICO's text allows private plaintiffs to seek permanent injunctions, the text of § 1964(a) is unrestricted and unambiguous. As in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985), this absence of restriction does not demonstrate ambiguity; it demonstrates breadth.

The reading of § 1964 that Petitioners now proffer is unreasonable because it fails to explain why the government – which, like private plaintiffs, is not mentioned in § 1964(a) – can use the permanent injunctive remedies of § 1964(a) while other RICO parties cannot. Pet. App. 10a, 12a. Petitioners' crabbed and illogical reading of § 1964 must be rejected.[14]

12. Also, as *Ashland Oil, Inc. v. Gleave*, 540 F. Supp. 81, 84 (W.D.N.Y. 1982), observed, § 1964(a) is limited to relief necessary "to prevent and restrain violations of Section 1961." Most forms of interim relief, like asset freezes, would not satisfy this requirement.

13. Defendants in other cases have agreed. *E.g.*, *Bolin*, 231 F.3d at 977 (defendant did not contest availability of permanent injunctive relief); *Rhode Island Laborers Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 180 (D.R.I. 2000) (same). Even in *Wollersheim*, both parties and the lower court *assumed* injunctions were available until the Ninth Circuit raised the issue on its own initiative. 796 F.2d at 1080.

14. This Court has repeatedly instructed that as "a cardinal principle of statutory construction" a statute ought to be construed so that "no (Cont'd)

2. Petitioners' Antitrust Analogy. Petitioners make much of the difference in structure between the antitrust and RICO statutes, stressing that antitrust remedies are spread over many sections while RICO's are collected in § 1964. This distinction is meaningless in understanding RICO's remedies.[15] As the Seventh Circuit explained, despite numerous differences in statutory language and structure, this Court regularly treats the antitrust and RICO remedies identically. Pet. App. 16a-17a. Despite their differences, the antitrust laws were a model for RICO, and when RICO was enacted, injunctions had long been available to private antitrust plaintiffs. 15 U.S.C. § 26.

3. Conflation of Rights of Action with Remedies. Petitioners also err by conflating the question whether injunctive relief is available to *a party who has express standing*, with the question whether there is an *implied right of action* for a party *without express standing*. Their authorities, *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); and *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974), all address *implied* rights of action for parties without standing. These cases are uninstructive on whether parties who *do* have express statutory standing may seek injunctions.

American Stores is more helpful here. Rejecting the Ninth Circuit's restrictive reading of antitrust remedies, the Court explained that because the text there did not restrict the relief a

(Cont'd)
clause, sentence or word shall be superfluous, void or insignificant." *Duncan v. Walker*, 533 U.S. 167 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Petitioners' alternative interpretation of § 1964 also violates this principle because it would render the injunctive provision in § 1964(a) a nullity. Pet. App. 11a-12a.

15. OR (at 12) relies on *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904), to argue that RICO's private remedies are like those in the antitrust laws. But that case discussed Sherman § 4, 15 U.S.C. § 4, which resembles RICO's § 1964(b), not § 1964(a).

party could seek, the full range of equitable remedies was available. 495 U.S. at 281. This rule has clear application to RICO, whose text expressly declares that *private* rights of action were included *to strengthen the means available for fighting crime*, and requires RICO be construed to "effectuate its *remedial* purposes." *Sedima*, 473 U.S. at 498. Those "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* "[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. *See also Rotella v. Wood*, 528 U.S. 549, 557-58 (2000), stressing plaintiffs' important private attorney general role. These principles reinforce the Seventh Circuit's straightforward reading of § 1964(a).

C. Legislative History. Statutory interpretation begins with the statute's text. *Duncan v. Walker*, 533 U.S. 167 (2001). When the textual command is clear, the task also ends there. *Alexander v. Sandoval*, 532 U.S. 275, 288, n.7 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000). The Court has repeatedly stressed this rule of statutory construction with RICO, consistently rejecting interpretations that would limit its application in ways not reflected in its text.

Petitioners, unable to find their desired construction of § 1964 in RICO's text, invite the Court to embark upon a trek into "the thicket of legislative history." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). Petitioners rely solely upon *Wollersheim*. But as the Seventh Circuit recognized, *Wollersheim* substitutes "legislative history" for plain text, an approach that fails to conform to this Court's jurisprudence. Pet. App. 7a-8a. Even though *Wollersheim* conceded that an interpretation of § 1964 akin to the Seventh Circuit's was a "plausible reading," it discarded this reading to heed the "mandate[]" of legislative history. *Wollersheim*, 796 F.2d at 1084.

But legislative history does not issue mandates; statutes do. Petitioners are wrong about the circumstances where legislative history properly guides statutory construction. It is a

default mechanism used only when the text has failed. It cannot be used to cloud a statute's otherwise clear text.[16] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Even if legislative history could defeat a commonsense reading of § 1964(a), Petitioners' use of RICO's history is unpersuasive. Their version of this history plucks a few kernels from an ambiguous record, construes congressional inaction as positive achievement, and treats post-*hoc* remarks as the equivalent of pre-enactment congressional deliberation, the same error made in *Wollersheim*. *See* Pet. App. 15a.

Legislative history is particularly unhelpful when it consists of "snippets" that might support either party's conclusion. *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 963 n.4 (1997). Here, Petitioners' sole authority acknowledged that it relied on only part of § 1964(a)'s legislative history. *Wollersheim*, 796 F.2d at 1085. In fact, RICO's legislative history has more support for the conclusion *opposite* to that which the *Wollersheim* panel reached. *See* Blakey and Cessar, *Equitable Relief Under RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526, 549-52 (1987). For example, the only separate vote taken on private injunctive relief *passed* the Senate unanimously but was never voted on by the House. Rep. Steiger withdrew his amendment, noting that the bill may have already contained such relief. *Equitable Relief* at 550 (*quoting* 116 Cong. Rec. 35, 347 (1970)). Senator McClellan, RICO's chief Senate sponsor, emphasized: "RICO is not limit[ed to] the remedies . . . already . . . established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice." *Id.* at 556 (*quoting* 115 Cong. Rec. 9567 (1969)).

When, in addition to the defect of selective reference, the legislative history consists only of legislative inaction – the failure to enact a bill – legislative history has even less value as

16. Of course, the fact that parties take differing views of a statute's language does not render it ambiguous. *Miller*, 530 U.S. at 336.

a tool of construction.[17] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). Indeed, because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others," *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001), inferences drawn from a bill-that-never-was are "speculative." *Martin v. Hadix*, 527 U.S. 343, 357 (1999).

Even less reliable as a guide than pre-passage congressional inaction is legislative "history" that takes place *after* the statute's enactment, such as that offered by Petitioners here. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). When post-enactment history consists only of inaction by Congress, as here, its relevance as an interpretive guide approaches zero. *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) ("Congress can no more express its will by not legislating than an individual member can express his will by not voting."). This Court should decline Petitioners' invitation to grasp the thin reed of legislative history they offer to challenge the Seventh Circuit's sensible textual analysis.

D. No Practical Need to Resolve this Issue. Even without the mandate of § 1964(a), the courts' inherent powers support injunctive relief due to the strong governmental interest in preventing future violations. Absent the clearest congressional command to the contrary, federal courts retain inherent power to grant injunctions. *Califano v. Yamasaki*, 442 U.S. 682, 705

17. Compounding the unreliability, Petitioners and *Wollersheim* incorrectly assumed that Congress *rejected* an amendment providing private injunctions; the amendment was never rejected but merely withdrawn without a vote being taken in the House.

(1979); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (where a party has the right to sue, federal courts "may use any available remedy to make good the wrong"). In RICO, there is no "clear congressional command" to deny injunctive remedy; to the contrary, private injunctions honor § 904(b), which declares RICO's textual remedies are *in addition to* remedies available under other sources of law. Pub. L. 91-452 § 904(b), 84 Stat. 947 (1970), and RICO's liberal-construction clause, which mandates effectuating RICO's *remedial* purposes. Pub. L. 91-452 § 904(a), 84 Stat. 923, 947 (1970).

The availability of injunctions under RICO is unlikely to arise with future abortion protests, for FACE provides broad relief and is simpler to navigate. Moreover, even Petitioners have now publicly disclaimed interest in using the tactics that led to the judgment below. It is also telling that, despite the arguments raised in various *amicus* briefs that Petitioners have lodged with the Court, the parade of horribles they predicted has not materialized. Perhaps the dearth of such cases is due to protestors' use of lawful speech rather than wrongful force and violence.[18] Even if there were a circuit split, which there is not, litigants like Petitioners who have been found liable for scores of egregious and violent acts, and who have no challenge to the sufficiency of the evidence against them, are poor candidates for the special solicitude of this Court's plenary review.

II. There Is No Hobbs Act Issue Requiring the Court's Review

A. Improper Vehicle. Even without the Hobbs Act violations that the jury found, four other categories of predicate crimes – including two categories that are unchallenged here – are independently sufficient to sustain liability. This case, therefore, is an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct.

18. One of Petitioners' would-be *amici* below stated there, "By 1991, *most* of these pro-life advocates turned to other entirely lawful means of preventing abortions. . . ." Brief of *Amicus Curiae* Life Legal Defense Foundation in Support of Appellants, at 1.

Furthermore, this case does not present the Hobbs Act issue Petitioners pose. Even if Petitioners were correct, that the Hobbs Act protects only those property rights capable of being received, both the facts and the jury instructions show that Petitioners *did* seek to "obtain" Respondents' property in the form of control over Respondents' business decisions. The jury was properly instructed that Hobbs Act violations could be predicated on only those property rights that Respondents were induced to surrender. The Hobbs Act instructions did not permit liability premised on mere coercion, as Petitioners suggest.

B. No Circuit Split. *1. Intangible Rights.* The jury found Petitioners responsible for 21 acts of Hobbs Act extortion, predicated on "knowingly, willfully, and wrongfully us[ing] actual or threatened force, violence or fear to cause women, clinic doctors, nurses or other staff, or the clinics themselves *to give up a property right*." RA307-08.

Since *Carpenter v. United States*, 484 U.S. 19 (1987), it has been settled that property includes *intangible* property rights. *United States v. Green*, 350 U.S. 415, 420 (1956), made clear nearly 50 years ago that Hobbs Act extortion "in no way depends upon having a direct benefit conferred on the person who obtains the property." Unsurprisingly, every circuit to confront the issue has agreed that Hobbs Act extortion does *not* require property that can be physically "delivered"; those who obtain control over intangible property rights "obtain property" within the meaning of the Act, *e.g.*, *United States v. Santoni*, 585 F.2d 667, 672-73 (4th Cir. 1978) (compelling victim to enter into business contract), cert. denied, 440 U.S. 910 (1979); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977) (rejecting argument that "obtaining" means "reducing to actual physical possession"), cert. denied, 435 U.S. 968 (1978); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.) (extortion applied to intangible property, including business accounts and unrealized profits), cert. denied, 411 U.S. 951 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969) (forcing victim to give up right to solicit trash removal business satisfied

"obtaining property" requirement), cert. denied, 397 U.S. 1021 (1970); *see also United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) (defendant would violate Hobbs Act by demanding victim burn $1 million in cash), cert. denied, 479 U.S. 1095 (1987); *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.) (no need that defendant "receive" anything), cert. denied, 516 U.S. 945 (1995). Indeed responding to the Court's question in this case in 1993, the Solicitor General's office explained, "[T]he right to control the disposition of your [property] is, in itself, a property right." *NOW v. Scheidler*, No. 92-780, 1993 WL 757635, at * 22-23.

Because the extortionist typically seeks to obtain the victim's *agreement* to surrender a property right against the victim's will (*i.e.*, with "consent"), some courts have viewed the victim's *agreement* to surrender control as the property the defendant "obtains." *E.g.*, *United States v. Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992) (defendant obtained victim's promise). *Lewis*, 797 F.2d at 364 n.3, explained that while "most extortionists undoubtedly seek a direct and tangible economic benefit from their demands," others "may be motivated only by a desire to humiliate the victim or a third party, and the discomfort they cause is the gain they derive from the scheme."

This approach is fully consistent with the jury's verdict here, that Petitioners' crimes were designed to make Respondents "give up" their property rights. Petitioners demanded the clinics "close or be closed"; if Respondents didn't agree to surrender their right to do business, PLAN would use blitzkrieg tactics to close them by force, *e.g.*, RA196-206; PX801 at 17; T4104-05, 4111. Thus, Petitioners sought to obtain the clinics' agreement (against their will) to close *e.g.*, T1877-78; RA196-206.

Because the property extorted here was the right to make business decisions free from outside pressure illegally imposed, when Petitioners exerted control over that property, they "obtained property" under the Act. Just as surely as an extortionist who uses unlawful threats to control a corporate

board's decisions about what business to pursue, Petitioners used wrongful force to direct Respondents' business decisions and in so doing, sought to "obtain property" from them. On similar facts, other circuits have reached the same conclusion: *Arena*, 180 F.3d at 394 (anti-abortion extremists extorted property rights from clinics, doctors and patients); *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (it is "difficult to conceive a set of facts that more clearly sets forth extortion"); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (clinic's interest in providing services, and patients' interest in entering into a contractual relationship with clinic were property rights that were extorted). *Arena*, 180 F.3d at 394, explained that when the extorter attains "disposal of" property by "regulation of [its] fate," the extorter has "obtained" it, *citing* the definitions of "obtain" and "disposal" in THIRD NEW INTERNATIONAL DICTIONARY, 1559 (1976). *See also Tropiano*, 418 F.2d at 1076-77 (using force to make victim stay out of certain parts of trash removal business violates Hobbs Act).

2. Intangible Property Rights Versus "Ethereal" Rights. Nor is the Seventh Circuit's decision "difficult to reconcile" with *McNally v. United States*, 483 U.S. 350 (1987). *McNally* held that property under the mail fraud statute did not include the "right of the citizenry to good government." *Id.* at 356. But *Carpenter* made clear that *McNally* did *not* limit the meaning of property and affirmed that it includes *intangible* property rights as well as tangible ones. 484 U.S. at 25. Importantly, *Carpenter* distinguished the "ethereal" right to good government,[19] which is not "property," from the intangible property right to control business information, which is. *Id.* The right to do business

19. Unlike *McNally*, there is no risk here of involving the federal government in setting standards for local officials. *See, e.g., United States v. Debs*, 949 F.2d 199, 201-02 (6th Cir. 1991) (finding that *McNally*'s concern about setting standards for state and local officials had "no analogue in the union arena"), cert. denied, 504 U.S. 975 (1992).

free of unlawful outside pressure is an intangible property right fully protected under the Hobbs Act.[20]

3. No Split with the First or Second Circuit. Contrary to Petitioners' arguments, *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), does not dispute that the Hobbs Act protects Respondents' right to do business. *West Hartford* decided only that the *town* had no property right in overtime wages it paid its police to respond to defendants' violence. *Id.* at 102. Unlike private parties, the government is thought not to have property rights. *Cleveland v. United States*, 531 U.S. 12, 20 (2000),[21] *see also Equitable Relief* at 546. Furthermore, the more recent Second Circuit decision, *Arena* squarely held that the "obtaining of property" requirement was satisfied when defendants forced clinics and patients to surrender their right to do business with one another, 180 F.3d at 394.

Nor does *Libertad*, 53 F.3d at 436-37, suggest a circuit split. *Libertad* found the plaintiff *women's* claims failed because they had not shown that they suffered harm from Petitioners' conduct.[22] The court emphasized, however, that the women *would* have claims if they could prove injury to their business or property, "such as lost wages or travel expenses, actual physical harm, or specific property damages sustained as a result

20. Petitioner Scheidler (at 15) erroneously states that the Seventh Circuit defined property to include "liberty interests." It did not. The court said property includes the "intangible" right to conduct business, which even these Petitioners concede is property. Scheidler Pet. n.8.

21. Far from conflicting with the Seventh Circuit's holding, as Petitioners suggest, *Cleveland* supports it because *Cleveland* emphasizes how the property that is subject to extortion *must belong to the victim*. Because the video poker license at issue in *Cleveland* was not "property" in the hands of the governmental licensor, it could not support a mail fraud conviction. Here, unlike *Cleveland*, there is no question that the right to do business belonged to Respondents.

22. *Monterey Plaza Hotel Limited Partnership v. Local 483 of Hotel Employees*, 215 F.3d 923 (9th Cir. 2000), is similar. In this mail fraud case, the court held that the hotel's "goodwill" *could* indeed constitute property but found that defendants' deceptive acts did not cause loss.

of a RICO defendant's actions." The women here showed these types of harm in abundance. *E.g.*, T768-74, 1519-26, 1912-18.[23] As to the clinic's intangible right to freely conduct its lawful business, *Libertad* agreed it could sue anti-abortion extremists under RICO for Hobbs-based predicate acts, noting it would be "difficult to conceive a set of facts that more clearly sets forth extortion as it is defined by §1951(b)(2)." *Id.* at 438, n.6.

4. The Panaro Dicta. Confronted with decades of cases holding that "receipt" of the extorted property is not required, Petitioners conjure up a circuit "split" based on sheer *dicta* from *United States v. Panaro*, 266 F.3d 939 (9th Cir. 2001).[24] In its amended opinion, the *Panaro* panel gratuitously noted that defendants were trying to get the victim's business for themselves. Citing an inapposite 40-year-old robbery case,[25] *Panaro* appended the novel "receipt" requirement onto the long-accepted definition of Hobbs Act extortion, suggesting that someone "must receive the property of which the victim is deprived." *Id.* at 948.

The *Panaro* panel's gratuitous comment on which Petitioners' "split" depends is unpersuasive; it is mere *dicta* and had absolutely no impact on the court's holding. Because "receipt" of property was unnecessary to the court's decision, it has no precedential value even in its own circuit. *E.g., Best Life Assurance Co. of California v. Commissioner*, No. 00-71082,

23. Petitioner Scheidler concedes that the *clinics'* right to do business is a property right, while contending that a patient's right to seek medical products and services is not a property right. Because the judgment that provides the basis for the injunction and damages here would still stand even if the *patients'* property rights were not extorted, the issue has no practical importance.

24. Even Petitioners do not contend *Panaro held* receipt is required; they call it a "conclusion." Scheidler Pet. 16.

25. Cases construing the Hobbs Act's robbery prong are inapposite, for robbery covers only "*personal* property," 15 U.S.C. § 1951(b)(1).

2002 U.S. App. LEXIS 2190, at *5 (9th Cir. Feb. 11, 2002).[26] Furthermore, because Petitioners' extortion of Respondents' right to do business satisfied the "obtaining of property" requirement, even if *Panaro*'s *dicta* were correct, it would not change the outcome here.

C. *Enmons*. Petitioners contend that the Seventh Circuit's analysis is "in considerable tension" with *United States v. Enmons*, 410 U.S. 396 (1973). It is not. In the 29 years since *Enmons* was decided, courts have been careful not to extend its application outside the collective bargaining context. *E.g., Debs*, 949 F.2d at 200-01; *United States v. Zappola*, 677 F.2d 264, 269-70 (2d Cir.), cert. denied, 459 U.S. 866 (1982); *United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). There are good reasons for the decision not to extend *Enmons*, for "there is a danger that *Enmons*, if read as the appellants read it, could effectively repeal the Hobbs Act." *Cerilli*, 603 F.2d at 419.

The violence in *Enmons* occurred during a legitimate union strike. Because the workers had a lawful claim to obtaining the property at issue – higher wages – the Court concluded that their strike was not "wrongful." 410 U.S. at 400. In contrast, the Petitioners here had no lawful claim to obtaining Respondents' property, namely their right to do business with one another. Thus, even if *Enmons* applied, Petitioners' attempt to obtain control over Respondents' right to do business would not fit the *Enmons* exception.

Petitioner Scheidler also erroneously contends that the property in *Enmons* included not just the higher wages but also

26. *Panaro* fails to discuss earlier Ninth Circuit cases that impose no "receipt" requirement. *E.g., United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) ("right to make personal and business decisions [about life insurance] free of threats and coercion" was a property right that defendants made the victim give up), cert. denied, 475 U.S. 1024 (1986). *See also United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (intangible right to make business decisions free of wrongful coercion is property right under Hobbs Act), cert. denied, 450 U.S. 916 (1981).

the transformer the workers damaged during the strike. They argue that because the workers had no right to *that* property, *Enmons* should apply whenever defendants claim some general lawful purpose. Scheidler is wrong for two reasons. First, a careful reading of *Enmons* shows that the transformer was not the "property" to which the Court was referring. (Nor is the property here the medications and equipment Petitioners destroyed, but rather the Respondents' right to do business.)

Second, if *Enmons* meant what Petitioners suggest, every defendant charged with extortion would claim a "rightful" purpose, whether political, religious, environmental, moral or something else. The lower courts have rejected such an exception to the Hobbs Act, and nothing in the Act's text supports its creation. *E.g.*, *United States v. Anderson*, 716 F.2d 446, 447-48 (7th Cir. 1983) (upholding Hobbs Act conviction for threatening doctor to make him stop performing abortions); *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975) ("there is no exception to the Hobbs Act which permits extortion for . . . a [religious] purpose."); *United States v. Mitchell*, 463 F.2d 187, 193 (8th Cir. 1972) (rejecting argument that civil rights protest was not subject to Hobbs Act and quoting Congressman Hobbs, that "crime is crime, no matter who commits it"), cert. denied, 410 U.S. 969 (1973). Petitioners' argument merely repackages their unsuccessful "motive" defense to RICO, that having a political/religious "motive" while intentionally committing crimes is a defense. The Court unanimously rejected that argument with RICO. As Justice Souter, joined by Justice Kennedy, explained, "it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling." *NOW v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring). The "good motive" argument has no more viability under the Hobbs Act than it does under RICO. Furthermore, if there was ever any doubt that terrorists who commit crimes for political/religious reasons can be as dangerous as those who do so for financial profit, there can be none now.

D. Federalism. *United States v. Culbert*, 435 U.S. 371 (1978), rejected federalism concerns like those Petitioners raise, acknowledging that Congress *intended* the Hobbs Act to make extortion a federal crime, even though it was already a crime on the state level. *Id.* at 379. *See also United States v. Sturm*, 870 F.2d 769, 771-72 (1st Cir. 1989) (rejecting argument that application of Hobbs Act was a threat to state sovereignty or a waste of resources). The Court has long recognized that Congress intended the Hobbs Act to use all the constitutional power Congress had to prosecute anyone who interfered with interstate commerce, *Stirone v. United States*, 361 U.S. 212, 215 (1960), and to protect interstate commerce to the fullest extent possible. *Green*, 350 U.S. at 420-21.

III. There Is No Reason to Grant a Writ on the State Extortion Instruction

A. Improper Vehicle. Because Petitioners' liability could be sustained without Petitioners' predicate violations of state extortion laws, any error in the state law instruction is harmless, and this case is an improper vehicle for resolving the issue. The issue is doubly insignificant because Petitioners waived their objections, both at trial and on appeal. *See City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ of *certiorari* as improvidently granted because petitioner failed to object to instruction at trial). Plenary review by this Court is also unnecessary because OR merely seeks review of a state law extortion instruction that incorporated *all* of the elements of several states' extortion laws in a single instruction. Because the Seventh Circuit declined to address the contention due to harmless error, there is no reason for the Court to consider it. This Court, as a court of review, not first view, *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511, 514 (2001), need not be the first to consider this issue.

Furthermore, OR does not contend – nor could it – that there is a circuit split on this issue, nor is there any overriding issue of federal law. OR cites no other case involving a unified instruction like the one used here, and the issue is unlikely to

recur. Indeed, this issue is so unworthy of review that Petitioner Scheidler elected not even to raise it.

B. Petitioners' Waiver. Because the trial court must be given the opportunity to correct any errors, a party may not claim error in an instruction unless that party objects, "*stating distinctly the matter objected to and the grounds of the objection*." Fed. R. Civ. P. 51. Objections must reveal "the *precise* nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). Otherwise, objections are meaningless and error is waived. *Knox v. Indiana*, 93 F.3d 1327, 1333 (7th Cir. 1996).

Petitioners waived any challenge to the state extortion instruction by failing to object with even a modicum of specificity. Respondents' initial draft included separate instructions for each relevant state, which overlapped to a large degree. R1101. Petitioners made some objections, R1099, then the parties worked to simplify the instructions, as OR told the court. 02/20/98 T182. Respondents' revised draft presented a unified instruction incorporating each state's elements and met all of Petitioners' previous concerns. R1093. Petitioners never objected to the revised instruction with any specificity. OR simply asked, "[H]ow can one have a generic extortion charge?" T4355. When asked what was wrong with the instruction, OR relied on its earlier objection, which Respondents had satisfied.[27] T4355-58. By failing to identify any element it thought lacking, OR waived any argument it might have had.[28]

---

27. Petitioners' objection to the earlier instructions was mooted by the revised instruction, *see Spanish Action Committee v. City of Chicago*, 766 F.2d 315, 319 (7th Cir. 1985).

28. OR waived any error again by failing to raise all its objections in its opening brief in the Seventh Circuit. OR discussed a few states, but Respondents' response showed the unified instruction met those standards. For example, although OR argued Wisconsin requires "pecuniary" intent, Respondents showed Wisconsin's law includes threats of injury to compel the victim "to do any act against the person's will." Wis. Stat. § 943.30(1). Indeed, *United States v. Nardello*, 393 (Cont'd)

C. The State Extortion Instruction Was Correct. Even if Petitioners had not waived their objections, the state extortion instruction was correct. Jury instructions are reviewed with great deference. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 342 (1988). They are examined as a whole, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), in a common sense manner, avoiding fastidiousness, to see if the correct message was conveyed reasonably well. *United States v. O'Malley*, 796 F.2d 891, 897 (7th Cir. 1986). Here, because the pertinent states' extortion laws had so many common elements, separate instructions would have been duplicative and burdensome. One instruction incorporating *all* the elements of each pertinent state's law sensibly solved the problem.

State law extortion is a predicate act under § 1961(1)(A); it is also a basis for violating the Travel Act, 18 U.S.C. § 1952, which is itself a predicate act for RICO. (Petitioners have not challenged the verdict's Travel Act violations.) OR concedes extortion under both includes activity "within the generic term extortion." In *Nardello*, the Court rejected formalistic distinctions between extortion and coercion and made clear that "extortion" under the Travel Act is not limited by the labels states use, because that would "give the term 'extortion' an unnaturally narrow reading." 393 U.S. at 296. Instead, the Court explained, the Travel Act covers activity generally known as extortion. OR concedes this means "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." OR Pet. 24. That is exactly what the state law extortion instruction told the jury, except it required *even stricter findings* based on additional elements in certain

(Cont'd)

U.S. 286, 294 (1969), classified this very statute as extortion. On reply, for the first time, OR took issue with some *additional* states. Its failure to raise these challenges in its opening brief was a waiver under Seventh Circuit precedents, *e.g., Federal Trade Comm'n v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). Those waiver rules should be respected. *See Beck v. Washington*, 369 U.S. 541, 550-53 (1962).

states (*e.g.*, value of property "must exceed $150" in Missouri). RA72.

IV. This Case Does Not Present the First Amendment Issues Petitioners Raise

A. No Unsettled Issue. Petitioners try to manufacture another circuit split where none exists, this time on First Amendment grounds. The principles governing vicarious liability and peaceful protest are settled, and Petitioners simply seek review of the application of those principles to the record here; this does not merit the Court's review. As for the alleged error, there is none: the courts below faithfully followed *Claiborne* and *Bose*.

Instruction 12 told the jury, "*Nor is peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing [and] leafletting are protected by the First Amendment.*" RA57. The Verdict Form ensured damages were based only on the predicate crimes. Question 9, RA3. Accidental violence was not actionable; the jury had to find PLAN's predicate crimes were committed "knowingly, willfully and wrongfully" with Petitioners' specific intent. Instruction 30, RA76.

There was no "guilt by association." The jury was told that "liability may not be imposed merely because the defendant belonged to a group, some members of which committed acts of violence." Instruction 30, RA76. "Mere advocacy of the use of force and violence may not be the basis for finding the defendants liable. . . ." Instruction 34, RA81. Petitioners could be held liable only if PLAN authorized or ratified the crime and *Petitioners themselves had the specific intent to further it*. Instruction 30, RA76. The jury, under these instructions, found Petitioners operated PLAN through a pattern of force and violence, knowingly, willfully and with specific intent that each crime be committed. There is no reason to review the application of these correct principles of law to the record of overwhelming evidence of Petitioners' liability.

B. The Vicarious Liability Instructions. OR argues that its liability was based on acts by "anyone participating in a pro-life demonstration." This is untrue, for several reasons. First, Instructions 20, 21, 24, 30 and 34, based on *Claiborne*, ensured this could not happen.[29] Petitioners themselves drafted Instruction 30, on vicarious liability, never objected to its final wording, T4922-23, and thus waived any objection, as the Seventh Circuit held. Pet. App. 25a-26a. By failing to object, Petitioners also waived the argument that more of the jury instructions should have been cross-referenced to the Verdict Form. *Id.*

Second, the trial judge reached the same conclusion as the jury, making findings under Rule 52(a); this was a second check that Petitioners' liability not based on "guilt by association." In fact, the trial court observed, "Plaintiffs have made a showing on which a reasonable juror could conclude that the [Petitioners] authorized all of the acts alleged in this case, including the acts of violence. . . . There is enough evidence to fill up this courtroom that the [violent] conduct was authorized [by Petitioners]." T4563-64.

Third, after making an independent review, the Seventh Circuit found *Claiborne*'s "exacting test" was satisfied. Pet. App. 23a. It concluded that the jury could not have found Petitioners liable "without finding that the Defendants themselves specifically intended to further PLAN's illegal aims," Pet. App.

---

29. Instruction 20 required that Petitioners knew about the *illegal* acts. Instruction 21 required that Petitioners operated or managed the enterprise that used the illegal acts. Instruction 24 required the acts be committed knowingly, willfully and wrongfully. Instruction 30 declared that mere membership in a group whose members commit violence was not enough; PLAN itself had to authorize or ratify the act, and Petitioners themselves had to specifically intend them. Instruction 34 ensured that mere advocacy could not be the basis of liability. Petitioners argued these instructions to the jury extensively, stressing that to find liability, the jury had to find Petitioners had specific intent to further each unlawful act. T5045-73. That is what the jury found. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997) (courts assume the jury follows its instructions).

26a, that "PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the Defendants were aware of PLAN's illegal aims" and had specific intent to further them. Pet. App. 23a.

C. Crimes, Not Peaceful Acts. OR says its crimes were "primarily" sit-ins and blockades and implies they were peaceful.[30] But Question 6 on the Verdict Form, which *Petitioners proposed and drafted*, and Instructions 24 and 26, ensured that any predicate acts involving sit-ins or blockades *also involved fear, violence or force*. Question 6 asked whether the predicate crimes involved sit-ins "without more," to which the jury answered, "no." That answer proves conclusively that the jury found *none* of the 121 predicate acts was a peaceful or non-violent sit-in, as Petitioners claim.[31] Also, PLAN committed predicate crimes other than sit-ins and blockades, for example, vandalism, stalking, assaults and threats of violence. *E.g.*, T662-63, 1157, 3930, 4036, 4120-22; RA196-206. Each predicate crime involved the wrongful use of force, violence or fear. In addition, the trial judge found that Petitioners' conduct underlying the RICO claim was unprotected because "[t]hese acts crossed the line of expression into the realm of threatening conduct."[32] Pet App. 264a.

---

30. *Petitioners* offered proof that they also engaged in an occasional peaceful sit-in. Because peaceful sit-ins did not satisfy the requirements for predicate crimes in the jury instructions, Respondents did not argue that any of the peaceful sit-ins violated RICO.

31. OR insisted that Question 6 would ensure that the jury's findings of predicate acts would not be based on just the "sheer presence of people outside the clinic," but that any predicate act included criminal conduct illegal under RICO. T4485, 4568-69. It did.

32. Conduct that did not create "true threats" was excluded. *See* Instruction 25, RA71. Also, because the use of fear, force or violence had to be "wrongful," lawful pickets, hard bargaining tactics and other lawful exercises in persuasion cannot violate RICO. Many of the examples in the *amicus* briefs that Petitioners have lodged with the Court would not support liability.

Instructions 12 and 34 ensured Petitioners were not found liable for protected advocacy or speech, or for leafletting, picketing and other lawful conduct. The Verdict Form's Question 9 ensured damages flowed proximately from the predicate crimes and not from protected speech or other overt acts, thus satisfying *Beck v. Prupis*, 529 U.S. 494 (2000).

The Seventh Circuit too found that the "record is replete with evidence of instances in which [Petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts." Pet. App. 22a-23a.[33]

D. The Seventh Circuit's Plenary Review. Petitioners offer the radical proposal that the verdict of a properly-instructed jury can be set aside solely because a litigant would have liked a different verdict form. Not surprisingly, they offer no authority for this idea, which, the Seventh Circuit noted, could infringe the Seventh Amendment. Pet. App. 19a. Instead, Petitioners lift *dicta* from *Claiborne* (which reviewed a bench trial) to suggest highly-particularized "findings" *by juries* are required. Petitioners ignore Rule 49 Fed. R. Civ. P., which tells juries to issue general verdicts unless the trial court calls for a special verdict or interrogatories. Juries are not subject to Rule 52, which directs judges to "find the facts specifically." (This is a uniquely poor case to review the jury-trial standard since the trial judge, on the same evidence, *did* make particularized findings of Petitioner's crimes. Pet. App. 234a-42a, 263a-68a.)

Bose requires an "independent review" of First Amendment issues, but as *Harte-Hanks Communications, Inc. v.*

---

33. Scheidler tries to raise another issue Petitioners waived by failure to raise it at trial: that the jury must agree on each predicate act. But the jury *was* told that unanimity was required for its findings. RA318. Furthermore, under RICO, even if Petitioners hadn't waived the issue, each predicate act is not a *separate* element; the predicate acts together are a *single* element. *Richardson v. United States*, 526 U.S. 813, 817 (1999), required unanimity only on each *element* of a crime.

Connaughton, 491 U.S. 657, 690-91 (1989), shows, this does not mean the jury must make "findings." In *Harte-Hanks*, the jury answered only *three* broad special interrogatories, in contrast to *four pages* of special interrogatories here. Further, *Harte-Hanks* showed that by reviewing the jury instructions, the verdict, any answers to special interrogatories and the record as a whole, the reviewing court performs the *Bose* analysis. *Id.* at 690. The Seventh Circuit made a painstaking, plenary review of the record. It found "ample evidence" that the jury's determinations were "fully supported by the record," and concluded that *Claiborne*'s "exacting test was satisfied." Pet. App. 20a-23a.[34] *Bose* requires nothing more.

CONCLUSION

The petitions for writs of *certiorari* should be denied.

Respectfully submitted,

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY
& CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Attorneys for Respondents

---

34. There is no "split" with *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001). That court examined evidence underlying an injunction against 60 defendants and found that, with regard to *one*, it was inadequate. In contrast to that one, low-ranking defendant in *Operation Rescue National*, there was "more than enough evidence" here that all Petitioners here were high-ranking PLAN leaders who *directly* and *actively* organized, coordinated and participated in PLAN's predicate crimes with specific intent to further them. Pet. App. 23a.

Supreme Court, U.S.
FILED
FEB 2 2002
OFFICE OF THE CLERK

No. 01-1118

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WALTER M. WEBER
ROBERT W. ASH
AMERICAN CENTER FOR LAW & JUSTICE
5th Floor
1650 Diagonal Road
Alexandria, VA 22314
(703) 740-1450

LARRY L. CRAIN
AMERICAN CENTER FOR LAW & JUSTICE
Suite 402
5214 Maryland Way
Brentwood, TN 37027
(615) 376-2600

JAY ALAN SEKULOW
Counsel of Record
COLBY M. MAY
JAMES M. HENDERSON, SR.
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

VINCENT P. MCCARTHY
AMERICAN CENTER FOR LAW & JUSTICE
8 S. Main St., P.O. Box 1629
New Milford, CT 06776
(860) 355-1902

Attorneys for Operation Rescue, Respondent in Support of the Petitioners

188

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. WHETHER PRIVATE LITIGANTS MAY OBTAIN INJUNCTIVE RELIEF UNDER CIVIL RICO 1

II. WHETHER HOBBS ACT EXTORTION COVERS MERE INTERFERENCE WITH ANOTHER'S RIGHTS 2

A. Conflict with *United States v. Enmons* 2

B. Bizarre and Novel Nature of Claim that "Interference" Equals "Extortion" 5

C. Distortion of "Property" to Include "Intangible Rights" 5

D. Conflict with the Ninth Circuit 7

E. Pandora's Box 7

III. WHETHER THE ASSOCIATIONAL LIABILITY IMPOSED IN THIS CASE VIOLATED THE FIRST AMENDMENT 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. United States, 531 U.S. 12 (2000) 6, 7

Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) 8

Mariah Boat, Inc. v. Laborers Int'l Union of North America, 19 F. Supp. 2d 893 (S.D. Ill. 1998) 4

McNally v. United States, 483 U.S. 350 (1987) 6

Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO, 215 F.3d 923 (9th Cir. 2000) 7, 9

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 4, 11, 12

Northeast Women's Center Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) 8, 9, 10

NOW v. Scheidler, 510 U.S. 249 (1994) 12

NOW v. Scheidler, 223 F.2d 615 (7th Cir. 2000) 11

Overnite Transp. Co. v. International Bhd. of Teamsters, 168 F. Supp. 2d 826 (W.D. Tenn. 2001) 4

Stephens Group, Inc. v. Voices for Animals, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) 8

United States v. Enmons, 410 U.S. 396 (1973) 2-5

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001) 7

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I 11, 12

U.S. Const. amend. V 9

18 U.S.C. § 1951(b)(2) . . . . . 2, *passim*

Fed. R. App. P. 28(j) 7

S. Ct. R. 12.6 1

OTHER AUTHORITIES

Bradley, *Symposium: RICO Thirty Years Later: A Comparative Perspective* -- NOW v. Scheidler *Round Two*, 27 Syracuse J. Int'l L. & Com. 233 (2000) 11

"Furriers file a RICO suit over animal rights projects," The Star-Ledger (Aug. 6, 1999) 8

"Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) 8

Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis U.L.J. 575 (1997) 4

Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (1998) 8

INTRODUCTION

Operation Rescue (OR), like the petitioners Joseph Scheidler *et al.* [hereafter "Scheidler Defendants"], was a defendant in the trial court and an appellant in the Seventh Circuit in the present case. OR has filed a petition for a writ of certiorari [hereafter "OR Pet."], docketed in this Court as *Operation Rescue v. National Organization for Women*, No. 01-1119.

OR is a nominal respondent, under this Court's Rule 12.6, with regard to the petition of the Scheidler Defendants [hereafter "Scheidler Pet."], docketed as *Scheidler v. National Organization for Women*, No. 01-1118. Pursuant to Rule 12.6, OR respectfully files this response in support of the Scheidler Defendants in No. 01-1118.

OR urges this Court to grant both petitions -- in Nos. 01-1118 and 01-1119 -- and set them down for plenary consideration.

I. WHETHER PRIVATE LITIGANTS MAY OBTAIN INJUNCTIVE RELIEF UNDER CIVIL RICO

OR fully supports the Scheidler Defendants' presentation of this question, which complements that of OR. *See* OR Pet. § I.

In this case, the Seventh Circuit held, in conflict with the Ninth Circuit (and virtually every other court to address the issue), that a private party may obtain injunctive relief under civil RICO. The pertinent statutory text and history, and the relevant precedent, overwhelmingly demonstrate that RICO does not authorize private parties to obtain injunctive relief. *Id.*[1]

---

[1]Tellingly, NOW and the abortion business co-plaintiffs (respondents here) themselves did not originally claim entitlement to injunctive relief under RICO. The Amended Complaint, filed in 1989, was the first pleading (continued...)

II. WHETHER HOBBS ACT EXTORTION COVERS MERE INTERFERENCE WITH ANOTHER'S RIGHTS

OR fully supports the Scheidler Defendants' presentation of this question as well. *See* OR Pet. § II.

The Seventh Circuit held in this case that merely causing "a loss to, or interference with the rights of," another person is "all that is required" to satisfy the "obtaining of property" element of Hobbs Act extortion, 18 U.S.C. § 1951(b)(2). *See* Scheidler Pet. App. 29a. Several points about this holding merit brief elaboration.

A. Conflict with *United States v. Enmons*

The Scheidler Defendants correctly point out that the result in *United States v. Enmons*, 410 U.S. 396 (1973), would have to be different under the rationale of the decision below. Indeed, the Seventh Circuit's distorted view of Hobbs Act extortion is radically at odds with both the majority and the dissent in *Enmons*.

---

[1](...continued)
to invoke RICO. That pleading, and the subsequent Second Amended Complaint, specified the relief sought under each separate claim. In both pleadings, plaintiffs expressly sought injunctive relief under Count I -- the antitrust claim -- but did not mention any request for an injunction under the RICO counts (Counts II-IV). *See* Am'd Cplt. at 29-30, 38, 40, 41; 2d Am'd Cplt. at 29-30, 38, 40, 41. (The Second Amended Complaint appears in the Joint Appendix in *NOW v. Scheidler*, No. 92-780 (O.T. 1993), at pp. 39-80.) It was only in the Third Amended Complaint, filed on remand after this Court's 1994 ruling, that plaintiffs first claimed an entitlement to injunctive relief under RICO. 3d Am'd Cplt. at 35-36. The motivation seems plain: once the lower courts rejected the plaintiffs' antitrust claim in the Second Amended Complaint, plaintiffs decided to try to make new law under RICO as a replacement basis for injunctive relief.

In *Enmons*, the question was whether the Hobbs Act applied to labor violence in support of higher wages and other employee benefits. This Court divided 5-4 over the question, with the majority holding that "the use of violence to achieve legitimate union objectives" was not the "wrongful" obtaining of property for purposes of Hobbs Act extortion. 410 U.S. at 400. But not a single Justice suggested that the violent destruction of property that had occurred in that case could itself qualify as the extortionate "obtaining" of property under the Hobbs Act. Yet the decision below endorses precisely such a theory. *See* OR Pet. at 20-21; Scheidler Pet. at 19-20.

The decision below would plainly nullify the holding in *Enmons*. Instead of prosecuting violent union protesters for the extortionate obtaining of better wages and benefits (an "obtaining" that, under *Enmons*, is not "wrongful"), prosecutors -- under the Seventh Circuit's faulty rationale -- could simply charge the protesters with extortionate "obtaining" of the property or rights damaged or interfered with, i.e., by "causing a loss to, or interfering with the rights of" (Scheidler Pet. App. 29a) others. The "obtaining of property" element would be satisfied by the damage to transformers (as in *Enmons*) or to other company property, or by interference with the liberty of management or employees, for example, to cross the strike line. Scheidler Pet. at 22. The legitimacy or wrongfulness of the ultimate "obtaining of wages" would be irrelevant, because the unlawful "obtaining-by-interference," according to the court below, would satisfy the Hobbs Act.

The rationale of the decision below would thus render meaningless the entire debate in *Enmons*. Whether obtaining higher wages is "wrongful" or not under the Hobbs Act is wholly beside the point if wrongful "obtaining property" (as opposed to wrongful "causing a loss" or "interference with

rights," Scheidler Pet. App. 29a) is not even a necessary element of Hobbs Act extortion.[2]

The *Enmons* majority was insistent that the Hobbs Act would not proscribe misconduct on a picket line, even a physical assault. 410 U.S. at 404-05. The dissent was even more emphatic, dismissing the notion that a "fistfight on a picket line" could violate the Hobbs Act as "nonsense." *Id.* at 418 n.17 (Douglas, J., dissenting). Yet in the present case it was precisely demonstration misconduct -- the nonviolent sit-ins themselves, plus several scattered[3] incidents of alleged

[2]The potential for businesses to use RICO actions based on an expansive concept of Hobbs Act extortion against union activists has not gone unnoticed by judges and commentators. *See, e.g.*, Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis U.L.J. 575, 579 (1997) ("Union pressure tactics ranging from picket line insults to corporate campaigns have become increasingly vulnerable to legal actions in tort or under the RICO statute"); *Overnite Transp. Co. v. International Bhd. of Teamsters*, 168 F. Supp. 2d 826, 841-43 (W.D. Tenn. 2001) (expressing concern over expansive reading of state and federal extortion laws as RICO predicates for civil suits against coercive labor activities: "If any coercive conduct on the part of picketers and strikers constitutes extortion, seemingly every 'garden variety' unfair labor practice will be swept into the fold of RICO"). *See also Mariah Boat, Inc. v. Laborers Int'l Union of North America*, 19 F. Supp. 2d 893, 896 (S.D. Ill. 1998) (RICO suit based on Hobbs Act extortion counts against union activists who, among other things, "disrupted . . . manufacturing facilities and dealer shows through mass picketing and leaflet distribution"); *id.* at 901 & n.4 (finding *Enmons* inapplicable).

[3]A comparison with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is instructive. In *Claiborne*, there were at least ten violent incidents in one county of Mississippi over a seven-year period. *Id.* at 888, 893, 898, 904-06, 920. In the present case, the jury found only four (unspecified) acts or threats of violence, OR Pet. at 4 n.5, in the context of nationwide demonstrations over a fourteen-year period, *id.* at 6-7. This Court described the violent acts in *Claiborne* as "isolated," 458 U.S. at 924, and "relatively few," *id.* at 933. *A fortiori*, the same is true here.

violence[4] -- that formed the very core of both respondents' case and the jury's verdict, as well as the basis for the Seventh Circuit's affirmance under the Hobbs Act. OR Pet. at 3-4 & nn. 2-6; Scheidler Pet. App. 2a, 19a, 29a.

B. Bizarre and Novel Nature of Claim that "Interference" Equals "Extortion"

It would be difficult to overstate the novelty -- and bizarre nature -- of NOW's theory, endorsed by the court below, that "interference with rights" equals the extortionate "obtaining of property."

Significantly, no state or federal criminal extortion charges were brought for *any* of the dozens of supposedly extortionate sit-ins or other acts on which the RICO claim was based. *See, e.g.*, Tr. 1777-78 (Lt. Pyrdum); RICO Case Statement [Amended] (Oct. 31, 1994) at 5-6, Ex. A, B (listing criminal charges/convictions for alleged predicate acts, none of which are for "extortion"). Indeed, it would be bizarre for a prosecutor to charge that a sit-in protest was felony "extortion," yet that was precisely NOW's theory (embraced by the court below). As this Court stated in an analogous context, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *Enmons*, 410 U.S. at 410.

C. Distortion of "Property" to Include "Intangible Rights"

The most obvious flaw in the Seventh Circuit's "extortion" theory is that the defendants (and others "associated" with them) did not "obtain" -- as opposed to "interfere with" or

[4]The defendants vigorously deny any charge of violence. OR Pet. at 6 & n.9. Indeed, OR demanded all "rescue" demonstration participants to sign a pledge of nonviolence. *Id.*

"impair" -- the supposed "property." But a second major flaw also plagues the Seventh Circuit's approach: the court below swept intangible rights into the definition of property that can be "obtained" under the Hobbs Act. *See* Scheidler Pet. at 17-20, 22.[5] This Court has repeatedly distinguished between "property," on the one hand, and "intangible rights," on the other, when construing the "obtaining property" element of federal criminal statutes. *E.g.*, *McNally v. United States*, 483 U.S. 350, 356, 358, 360 (1987); *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000).

The Seventh Circuit's essentially limitless theory of property rights, like the prosecution theories in *Cleveland*, must be rejected "not simply because they stray from traditional concepts of property," 531 U.S. at 24, but also because this approach "invites . . . a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement from Congress," *id.* This Court warned in *Cleveland* that a novel expansion of the statutory term "property" "would subject to federal . . . prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* The same concern applies here. Scheidler Pet. at 21-22.

Invoking the rule of lenity, this Court noted in *Cleveland* that any ambiguity about the term "property" must be resolved in favor of a less expansive meaning. 531 U.S. at 25. Highly apropos of the present case, this Court found the rule of lenity "especially appropriate" in construing a federal crime which "is a predicate offense under RICO," *id.*

[5]This issue was also argued in the court below. *See* Brief and Short Appendix for Defendant-Appellant Operation Rescue at 38-39. The Seventh Circuit rejected the argument. Scheidler Pet. App. 29a.

The Seventh Circuit disregarded[6] this Court's unanimous and pointed admonitions in *Cleveland*, and instead read the Hobbs Act in a novel and expansive manner that puts federal prosecutors and private RICO plaintiffs in charge of policing demonstration misconduct.

D. Conflict with the Ninth Circuit

The Scheidler Defendants correctly point out that the Seventh Circuit's extortion holding conflicts with the Ninth Circuit's embrace of a proper understanding of the "obtaining property" element of Hobbs Act extortion in *United States v. Panaro*, 266 F.3d 939 (9th Cir. 2001). *See* Scheidler Pet. at 16-17; OR Pet. at 22. *Panaro* is by no means an isolated decision. *See Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO*, 215 F.3d 923 (9th Cir. 2000). In *Monterey*, the Ninth Circuit noted that the *impairment* of a business's goodwill, even if that goodwill could be considered property for some purposes, was not the *obtaining* of property. *Id.* at 926. (*Monterey* addressed the "obtaining property" element of the federal mail and wire fraud statutes; the Hobbs Act contains the same element.) The defendants simply did not "*obtain* property," *id.* (emphasis in original), the court explained: their "conduct may have been vexatious or harassing, but it was not *acquisitive*," *id.* at 927 (emphasis added).

E. Pandora's Box

The Scheidler Defendants correctly point out that the Seventh Circuit's gross overreading of the Hobbs Act, to cover

[6]In a notice of supplemental authority, *see* Fed. R. App. P. 28(j), OR had called the attention of the court below to the *Cleveland* decision. (The opinion in *Cleveland* was announced after oral argument had been held in the Seventh Circuit in the present case.)

mere interference with someone's rights, can be used not just against pro-life demonstrators but also protesters of all political persuasions. Scheidler Pet. at 21-22. This is not mere speculation. Civil RICO is already being invoked against protesters of various political stripes. *See, e.g., Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998) (www.house.gov/judiciary/35055.htm) (testimony of Jeffrey S. Kerr, General Counsel, People for the Ethical Treatment of Animals) (civil RICO suit filed against anti-vivisection protesters); *Stephens Group, Inc. v. Voices for Animals*, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) (laboratory and its shareholder adding civil RICO claims against animal rights groups); *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) (civil RICO suit filed against anti-fur protesters); "Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) (same); "Furriers file a RICO suit over animal rights projects," The Star-Ledger (Aug. 6, 1999) (http://www.nj.com/jersey/ledger/c8d3da.html) (federal civil RICO suit filed in Newark, New Jersey, against animal rights groups).[7]

Concern about the propagation of such suits prompted the

[7]The fact that the cited cases were filed in district courts within the Third Circuit is no coincidence. In *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the Third Circuit opened the door to such suits by holding that protests which interfered with an abortion business constituted Hobbs Act extortion and thus were RICO predicates. The Seventh Circuit's adoption of a similarly distorted view of federal extortion in the present case will, unless corrected by this Court, doubtless spawn its own clones.

environmental group Greenpeace USA to file an *amicus* brief in the *Monterey* case (*supra* § II(D)) urging the Ninth Circuit to reject expansive interpretations of the Hobbs Act's prohibition against the "obtaining" of "property" through extortionate means. Specifically, Greenpeace expressed the concern -- highly pertinent to the present case -- that the Hobbs Act's prohibition on extortion was "now being employed by corporations to describe *any* interference by protestors with their business," a development that "represents a radical and untenable expansion of the Hobbs Act which threatens to criminalize and federalize political protest all over the United States." Brief of *Amicus Curiae* Greenpeace USA in Support of Appellee Hotel Employees and Restaurant Employees, Local 483, *Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO*, No. 99-16714 at 3, 4 (9th Cir. filed Jan. 20, 2000) (hereafter "Greenpeace Br.") (emphasis in original).[8] Greenpeace traced this development to cases such as *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), which it said reflect a "judicial reaction" to anti-abortion protests but which rest on a "fundamental error": they "create out of thin air a federal common law of intangible property rights that is radically more expansive than the law recognizes in any other context," including "under the Fifth Amendment Takings Clause, environmental law, bankruptcy law, [and] the common law of conversion," Greenpeace Br. at 3-5; *see also id.* at 6-13 (discussing definitions of "property" in these other settings).

Greenpeace went on to express concern that numerous activities of its members and other environmental activists --

[8]For the Court's convenience, OR is lodging copies of the Greenpeace brief with the Clerk's office.

such as "demonstrat[ions] at the headquarters of a leading producer of genetically modified food" -- would violate the Hobbs Act under the expansive interpretations adopted in abortion protest cases such as *McMonagle*. Greenpeace Br. at 2, 3-4. The group elaborated on this concern:

> Greenpeace protestors have faced the same legal consequences as other social activists, like Martin Luther King, Jr., in this country's long tradition of civil disobedience. Misdemeanor prosecutions for trespass and nuisance are not uncommon for Greenpeace activists. However, the unwarranted and dramatic expansion of Hobbs Act extortion to misdemeanors, urged in this case, would add a poison arrow to the already well-stocked quivers of large corporations. RICO suits, fortified by felony convictions, treble damages and giant attorneys' fees, could be easily used to cripple activist groups like Greenpeace and drive any social interest campaign out of the public arena. Greenpeace has a deep interest in making certain that political protestors do not get treated as criminal extortionists.

Id. at 2-3.

The Southern Christian Leadership Conference voiced similar concerns in an *amicus* brief that the SCLC sought, without success, to file with the Seventh Circuit in this case.[9]

[9]*See* Motion of the Southern Christian Leadership Conference for Leave to File Brief and Brief Amicus Curiae in Support of the Defendant-Appellants Joseph Scheidler, Pro-Life Action League, Inc., Andrew Scholberg, and Timothy Murphy, *NOW v. Scheidler*, Nos. 99-3076, 99-3336, 99-3891, & 99-3892, at 2 (7th Cir. Feb. 8, 2000) (arguing that "if the interpretation of RICO now being challenged is allowed to stand, SCLC and the entire nonviolent civil protest movement would be placed in serious peril"). Copies of the SCLC's proposed brief are also being lodged with the

(continued...)

That amicus brief urged reversal of the RICO judgment at issue here.

III. WHETHER THE ASSOCIATIONAL LIABILITY IMPOSED IN THIS CASE VIOLATED THE FIRST AMENDMENT

OR fully supports the Scheidler Defendants' presentation of this question. *See* OR Pet. § IV. *See also supra* note 3.

It is worth adding, moreover, that individuals and groups who do not necessarily share the defendants' views on abortion have nonetheless recognized the serious risks to (or infringement of) defendants' First Amendment rights in this case. For example, Professor Craig Bradley has concluded that the trial court's jury instructions "violate[d] the precision of regulation required by [*NAACP v.*] *Claiborne* [*Hardware Co.*, 458 U.S. 886 (1982)]." Bradley, *Symposium: RICO Thirty Years Later: A Comparative Perspective* -- NOW v. Scheidler *Round Two*, 27 Syracuse J. Int'l L. & Com. 233, 238 (2000); *see also id.* at 235 n.13 (noting that Prof. Bradley disagrees with the Scheidler defendants' views about abortion). Professor Bradley has also argued that RICO's imposition of treble damages is "clearly not allowed" under the restrictions on damages awards set forth in *Claiborne*. *Id.* at 236-37. And when this case was last before this Court, the ACLU filed a brief at the merits stage emphasizing the special risks to First Amendment rights that arise when "civil RICO actions [are] brought against ideological associations," especially given RICO's "amorphous nature" and "the availability of treble damages." Brief Amicus Curiae of the American Civil

[9](...continued)
Clerk's office. The Seventh Circuit rejected the SCLC submission under that court's restrictive policy concerning *amicus* briefs. *See NOW v. Scheidler*, 223 F.2d 615, 616-17 (7th Cir. 2000).

Liberties Union in Support of Neither Party, *NOW v. Scheidler*, No. 92-780 (O.T. 1993), at 8, 15. The ACLU urged this Court, *id.* at 3, in the event of a remand, to provide specific guidance that would ensure that the mandate of *Claiborne Hardware* was strictly followed below and would provide much-needed guidance to the lower courts.

Members of this Court took special note of the serious First Amendment risks posed by RICO suits against protesters. *See NOW v. Scheidler*, 510 U.S. 249, 263-65 (1994) (Souter, J., joined by Kennedy, J., concurring). In view of the trial court's complete failure to follow *Claiborne Hardware*, and the Seventh Circuit's endorsement of that failure, the need for greater guidance identified by the ACLU is plainly no less pressing now than it was eight years ago.

CONCLUSION

This Court should grant both the Scheidler Defendants' petition for certiorari and Operation Rescue's petition for certiorari.

Respectfully submitted,

Walter M. Weber
Robert W. Ash
American Center for
Law & Justice
5th Floor
1650 Diagonal Road
Alexandria, VA 22314
(703) 740-1450

Jay Alan Sekulow
Counsel of Record
Colby M. May
James M. Henderson, Sr.
David A. Cortman
American Center for
Law & Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Larry L. Crain
American Center for
Law & Justice
Suite 402
5214 Maryland Way
Brentwood, TN 37027
(615) 376-2600

Vincent P. McCarthy
American Center for
Law & Justice
P.O. Box 1629
8 S. Main Street
New Milford, CT 06776
(860) 355-1902

Attorneys for Operation Rescue,
Respondent in Support of the Petitioners

February 20, 2002

(8)

No. 01-1118

Supreme Court, U.S.
FILED
MAR 19 2002
CLERK

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

168

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondents' Inflammatory and Misleading "Facts" .. 1

II. The RICO/Injunction Issue 2

III. The Hobbs Act Issue 5

IV. The *Claiborne* Issue 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 5

Bell v. *Hood*, 327 U.S. 678 (1946) 5

Cleveland v. *United States*, 531 U.S. 12 (2000) 9

Feminist Women's Health Ctr. v. *Roberts*, 1989 WL 56017 (W.D. Wash. May 5, 1989) 3

Griffin v. *United States*, 502 U.S. 46 (1991) 7

Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) 7

In re Nat'l Mortgage Equity Corp. Pool Certificates Sec. Litig., 682 F. Supp. 1073 (C.D. Cal. 1987) 3

McNally v. *United States*, 483 U.S. 350 (1987) 6

Melkonyan v. *Sullivan*, 501 U.S. 89 (1991) 5

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 9, 10

Oregon Laborers-Employers Health & Welfare Trust Fund v. *Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000) ... 3

Religious Tech. Ctr. v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 2, 3, 4

TABLE OF AUTHORITIES—Continued

Page(s)

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 4

Town of West Hartford v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) 7

United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000) 7

United States v. *Enmons*, 410 U.S. 396 (1973) 5

United States v. *Nedley*, 255 F.2d 350 (3d. Cir. 1958) 6

United States v. *Panaro*, 241 F.3d 939 (9th Cir. 2001) 5, 6

United States v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999) 8

Yates v. *United States*, 354 U.S. 298 (1957) 7

Statutes and Rule:

18 U.S.C. § 1951(a) 8

18 U.S.C. § 1951(b)(1) 6

18 U.S.C. § 1964(a) 4

18 U.S.C. § 1964(c) 4, 8

TABLE OF AUTHORITIES—Continued

Page(s)

FED. R. CIV. P. 52(a) 10

Miscellaneous:

ADMIN. OFFICE OF THE U.S. COURTS,
JUDICIAL BUSINESS 2001 4

REPLY BRIEF FOR PETITIONERS

This case presents three important and recurring issues of federal law on which the circuits are sharply divided. Respondents seek to distract the Court from these issues of law by dwelling on disputed evidence presented at trial that has little to do with the questions presented and – for all we know – was not even the basis for the jury's determination of liability. When they get around to addressing the factors governing whether this Court's review is warranted, respondents have nothing even remotely persuasive to say. The petition should be granted.

I. Respondents' Inflammatory and Misleading "Facts"

Respondents open their brief (at 2-5) with a jury speech: a long litany of bad acts supposedly committed by unidentified abortion protesters over the 15-year period covered by this case. That recitation is riddled with inaccuracies.[1] More to the point, the jury in this case found that *only four* "[a]cts or *threats* of physical violence" to a "person *or property*" had occurred. Pet. App. 160a (emphasis added). There is no way of knowing, because respondents vigorously opposed every effort to require specificity in the jury's findings, whether those four unidentified incidents by unidentified protesters involved acts of violence against people or only threats of violence against "property" (broadly defined as "anything of value" (*id.* at 150a)). Compare Opp. 15 (falsely stating that petitioners were "found liable for scores of * * * violent acts"), 28 (same).

All of the remaining "crimes" respondents make so much of – which, according to the jury's findings, did *not* involve acts or threats of physical violence – consisted of "extortion" as that offense was improperly defined in the jury instructions.[2] At

---

[1] For example, there is not one iota of evidence to support respondents' scurrilous assertion (Opp. 2) that the "Petitioners" in this case – Joseph Scheidler, Andrew Scholberg, Timothy Murphy, the Pro-Life Action League, Inc. (or co-petitioner Operation Rescue) – "beat a * * * patient" in Los Angeles, "threw" a clinic employee in New Jersey "to the sidewalk," or did any of the other acts of violence attributed to them on pages 2-3 of the brief.

[2] Respondents suggest that petitioners had "links to arson and murder" (Opp.

respondents' insistence, the instructions permitted the jury to find an act of "extortion" if it concluded that someone "associated with PLAN" had used either "actual *or threatened* force, violence, *or fear*" (including "fear of wrongful economic injury") to cause the clinics or patients to "give up a property right" (including the "right to seek medical services"). Pet. App. 149a-151a (emphasis added). The instructions also authorized the jury to conclude that "the act of blockading" a clinic through nonviolent sit-ins "constituted a threat." *Id.* at 151a.[3]

In any event, respondents' catalogue of bad acts is irrelevant to the legal issues presented. It has nothing to do with the first and third issues presented. Nor is it relevant to whether the jury instructions, and the Seventh Circuit, applied a legally sound definition of "extortion."[4]

II. The RICO/Injunction Issue

A. *The Conflict.* As we showed (Pet. 6-10), the decision below conflicts with the Ninth Circuit's decision in *Wollersheim* (and with later cases in that circuit). Respondents argue, however, that "there is no circuit split" because *Wollersheim* involved a preliminary injunction. Opp. 7. That would come as

---

5 n.3), but, as they well know, those inflammatory allegations were dismissed before trial for lack of evidence (Pet. 4) and the jury was properly instructed that "[t]here is no claim in this case" that "the defendants themselves are responsible for any of those acts." Pet. App. 146a. See also *id* at 159a.

[3]Although they deny it in this Court (Opp. 28 n.30), respondents exploited this broad definition at trial by repeatedly urging the jury to find acts of extortion based on ordinary sit-ins at clinics that interfered (if only for a "few hours") with the freedom of patients to receive services. Tr. 5008; see also Tr. 4986-87, 5005 (arguing that sit-ins that "render a clinic inaccessible to women" are "enough to prove extortion"), 5008 (arguing that sit-ins that obstructed access to clinics by their very nature involve the use of "force").

[4] The main purpose of this exercise appears to be to persuade this Court that petitioners are "terrorists" who should be judged under different standards than apply to every other litigant. Opp. 15, 22. Unfortunately, respondent NOW has resorted to such tactics before. See *Amicus* Br. Catholic Conf. of Ill. *et al.*, at 4-5 (quoting Chicago NOW press release condemning peaceful prayer vigil led by Cardinal George in front of a Chicago clinic as "an act of aggression" that will perpetuate or encourage "violence" and "terrorism").

news to the Seventh Circuit, which acknowledged the conflict with the Ninth Circuit, described *Wollersheim* as holding "that private parties cannot seek injunctions under RICO" (Pet. App. 6a), and devoted many pages to explaining why the panel "cannot agree with the Ninth Circuit" (*id.* at 12a). Accord Pet. App. 88a-89a (district court's understanding of *Wollersheim*).[5]

Although the injunction in *Wollersheim* was preliminary, the court's extended analysis answered the broader question "whether civil RICO permits a private party to secure *injunctive* relief." 796 F.2d 1076, 1081 (1986) (emphasis added). The court held that "Congress did not intend to give private RICO plaintiffs *any* right to injunctive relief." *Id.* at 1088 (emphasis added). The Ninth Circuit has repeatedly acknowledged this holding. See OR Reply Br. 4 (citing cases). The Ninth Circuit (and district courts in that jurisdiction) have routinely applied *Wollersheim* in cases involving *permanent* injunctive relief.[6]

Respondents argue that this Court should wait until more circuits have taken sides before bringing uniformity to federal law. But the availability of private injunctive relief is a ripe issue. *Wollersheim* was decided more than 15 years ago. Other circuits have indicated their strong agreement with the Ninth Circuit's analysis and conclusion. Many district courts have followed *Wollersheim*. See OR Pet. 11 & n.17. *Wollersheim* and the opinion below set forth detailed and conflicting analyses of the issue. As respondents point out (Opp. 13), the issue has been

---

[5] Respondents never argued below that *Wollersheim* was distinguishable. They argued that it was wrong and should not be followed by the Seventh Circuit. See Resp. C.A. Br. 41-44. Worse yet, after Judge Rovner pointed out during oral argument that "the Fifth and Ninth Circuits have *held* there's no private right to injunctive relief," and other circuits "seem to doubt that it's available" (Oral Arg. Tr. 38 (emphasis added)), respondents' counsel took issue with the precise categorization of decisions but admitted: "*There's no question* the *Wollersheim* Court" so held. *Id.* at 41 (emphasis added).

[6] See, *e.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc.*, 185 F.3d 957, 966-68 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *In re Nat'l Mortgage Equity Corp. Pool Certificates Sec. Litig.*, 682 F. Supp. 1073 (C.D. Cal. 1987); *Feminist Women's Health Ctr.* v. *Roberts*, 1989 WL 56017, at *12 (W.D. Wash. May 5, 1989).

the subject of scholarly analysis. Nor is there any realistic possibility that the Seventh or Ninth Circuit will change its mind. See Pet. 10. The conflict is all the more intolerable because the nationwide injunction in this case applies even in the Ninth Circuit, where it is legally unauthorized. Pet. 9-10.

B. *Importance and Recurring Nature*. The issue has arisen frequently and has the potential to arise in *any* of the hundreds of private civil RICO actions filed each year. SEE ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2001, table C-2, at 46 (791 civil RICO actions filed in federal district courts in year ending Mar. 31, 2001, only 4 by government plaintiffs). Respondents suggest (Opp. 9 n.10, 15) that RICO's "future application" to abortion protesters is "unlikely" because the FACE Act independently proscribes obstruction of clinic entrances, but that is no answer. Civil RICO actions against abortion protesters account for only a small fraction of the hundreds of civil RICO cases. The panel's decision in this case will ensure that the issue will be raised with *greater* frequency in the future.

C. *The Merits*. Respondents' many pages of effort (Opp. 9-14) to prop up the Seventh Circuit's holding do little more than rehash the reasons cited by the court below. Tellingly, respondents make no effort to defend two cornerstones of the Seventh Circuit's analysis: its unfounded criticism of *Wollersheim* (Pet. 10-11) and its misplaced reliance on *Steel Co.* (Pet. 13-14). They also fail to come to grips with the evidence we identify in the text and structure of the statute. See Pet. 13; *Amicus* Br. of State of Alabama, at 4-6 (discussing this evidence). And they have nothing persuasive to say in response to our showing (Pet. 11-13) that Section 1964(c) was not only engrafted onto the rest of Section 1964 (and should be understood in light of that fact) but also expressly modeled after provisions in the antitrust laws that *do not authorize injunctive relief*. Along with the textual evidence, those two considerations amply "explain why the government * * * can use the permanent injunctive remedies in § 1964(a) while" private parties cannot. Opp. 10. Respondents' suggestion (Opp. 10) that we conceded in 1993 that injunctive relief is available is refuted by the very language they quote.

Finally, respondents say that there is "no practical need" to decide whether RICO authorizes private injunctive relief because federal courts can always grant such relief in the exercise of their "inherent powers." Opp. 14-15. But federal courts may not invoke their "inherent powers" to grant remedies Congress has withheld. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 101 (1991); *Alexander* v. *Sandoval*, 532 U.S.275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[7]

III. The Hobbs Act Issue

A. *The Conflict*. 1. *Enmons*. We showed in our petition (at 19-20) that *Enmons* would have come out the opposite way if the Seventh Circuit's expansive definition of "property" and "obtaining" were correct. Respondents do not even attempt to refute this conflict in principle between *Enmons* and the decision below. Instead, they principally argue (Opp. 21-22) that the lower courts have been reluctant to extend *Enmons* beyond the union context. They also fault us for supposedly suggesting that "the 'property' to which the Court *was referring*" in *Enmons* included the company buildings and transformer, and not just the wages. Opp. 22 (emphasis added). But we never suggested this. On the contrary, our argument is that the Court in *Enmons* *limited itself* to consideration of the wages because that was the only "property" that the defendants were seeking to "obtain."

2. Respondents fare no better in their efforts to explain away the conflicts in the circuits we have identified relating to the definitions of "property" and "obtaining." Pet. 16-19.

a. "Obtaining." The Ninth Circuit in *Panaro* ruled that extortion under the Hobbs Act "does not occur when a victim is merely forced to part with property." 266 F.3d 939, 947 (2001). "Rather," the court explained, "there must be an 'obtaining': someone – either the extortioner or a third party – must receive

---

[7] *Bell* v. *Hood*, 327 U.S. 678 (1946), provides no support for respondents' argument. As explained in the petitioners' and the government's merits briefs in *Barnes* v. *Gorman*, No. 01-682, the principle recognized in *Bell* is limited to *compensatory* relief for plaintiffs who otherwise would be left without any remedy. No. 01-682 Pet. Br. 27-29; No. 01-682 U.S. Br. 12-16.

the property of which the victim is deprived." *Id.* at 947-48. In *Nedley*, the Third Circuit reached the same conclusion in a Hobbs Act case involving "robbery" (which also involves "obtaining" of "property"). Pet. 16-17. These holdings are squarely at odds with the decision below. See Pet. App. 29a.

Respondents contend, incorrectly, that the analysis in *Panaro* is dictum. Opp. 20. The relevant language in *Panaro* is found in a portion of the opinion that upholds the extortion convictions of several defendants under the Hobbs Act against sufficiency challenges. In rejecting the defendants' arguments, the Ninth Circuit analyzed the meaning of "extortion" (including the element of "obtaining") and applied that analysis to the facts shown at trial. It went out of its way to emphasize the "importan[ce]" to its decision of the fact that the defendants had "sought not only to put [the victim] out of business, but actually *to get his business interests for themselves*." 266 F.3d at 948 (emphasis added). District judges in the Ninth Circuit and panels of that court will not be free to disregard *Panaro*.[8]

Respondents also contend that *Nedley* and other cases involving robbery under the Hobbs Act are "inapposite" because robbery "covers only '*personal* property.'" Opp. 20 n.25 (emphasis added) (quoting § 1951(b)(1)). But the fact that the definition of "robbery" includes only a subset of the property covered by extortion does not affect the scope of "obtaining."

b. "Property." As respondents are acutely aware (Opp. 20 n.23), the claims of the respondent *clinics* and *women* rest on different theories of "property." We identified (Pet. 17-20) a circuit conflict (and an inconsistency with *McNally*) with respect to the latter theory only. Other circuits disagree with the Seventh Circuit's holding that "property" includes "the class women's rights to seek medical services from the clinics." Pet. App. 29a. In the Second Circuit, those rights do not qualify as "property" because the Hobbs Act is restricted to "valuable

[8] The language respondents say is dicta was *added by the panel on rehearing*. See 266 F.3d at 943, 948; 241 F.3d 1104, 1109. The relevant passage hardly was "gratuitous" (Opp. 20). Nor are respondents correct (Opp. 21 n.26) that prior Ninth Circuit cases adopted a broader notion of "obtaining."

rights" that are "considered as a source or element of wealth."[9]

Respondents argue that the Second Circuit's decision in *Town of West Hartford* (and the First Circuit's in *Libertad*) are consistent with the opinion below because they recognize that "property" includes the "right to do business." Opp. 19. Again, we are *not* claiming a conflict with respect to the "property" element (as opposed to the "obtaining" element) underlying the *clinics*' claims. Respondents also suggest that the Second Circuit in *Arena* has since expanded the concept of "property" to include the right of "clinics and *patients * * * to do business with one another*." Opp. 19 (emphasis added). That is untrue. The only "property" at issue in *Arena* was the *clinic*'s (and *an individual physician*'s) "'right to conduct a business'" free from acts of vandalism. 180 F.3d at 392 (quoting jury instructions).[10]

B. *No Vehicle Problem.* In addition to 21 Hobbs Act extortion violations, the jury found that petitioners had committed a variety of other predicate acts. See Pet. 5 & n.3; Opp. 15-16. But this Court's cases make clear that where, as here, a jury verdict on a single count rests on a number of different legal theories, some of which are legally defective, the judgment must be vacated. See *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991) (citing *Yates* v. *United States*, 354 U.S. 298 (1957)). The verdict, moreover, does not permit a determination of which predicate acts the jury relied on in finding two acts within the requisite ten-year period or a "pattern" of racketeering activity. Pet. App. 160a. There is also no way of knowing which predicate acts the jury relied on in awarding damages.

In addition, all of the other predicate acts found by the jury

[9] Respondents spill much ink (Opp. 16-19) countering arguments we did not make: that "intangible" property is categorically outside of the scope of the Hobbs Act (and, relatedly, that "obtaining" requires "physical[] deliver[y]"). There is no need for the Court to address those arguments in this case because the liberty interest of patients is not a "property" right, and the right of clinics and physicians to conduct their business was never "obtained."

[10] Respondents correctly note (Opp. 7) that this Court denied review in *Arena*. But the petitioners in *Arena* failed to allege any conflict and failed to preserve their arguments below. 99-1554 U.S. Br. in Opp. 5-6.

were offenses that involve "extortion" defined in the *same way* as the 21 Hobbs Act "extortion" counts (including the same overbroad and legally erroneous definitions of "property" and "obtaining"). Pet. 5 n.3; Pet. App. 149a-51a.[11] Even the "generic" state law extortion counts were inextricably intertwined with the Hobbs Act definition at issue in this case.[12]

Respondents also suggest that the conflict we identified (Pet. 17-19) over whether a patient's liberty interest in receiving services from a clinic qualifies as "property" has "no practical significance" because the "judgment * * * would still stand even if the *patients*' property rights were not extorted." Opp. 20 n.23 (emphasis in original). They are mistaken. It is true that reversal of the decision below for failure to enforce the "obtaining" element would obviate the need to address the "property" element. But the faulty "property" definition supplies an independent basis for reversing the judgment as to NOW and the patient class, whose RICO claims necessarily rested on this theory of "property." See 18 U.S.C. § 1964(c) (standing to assert RICO claim requires injury to "business or property").

C. *Importance and Recurring Nature.* The importance of the Hobbs Act question (see Pet. 20-22) is underscored by the briefs from such divergent groups as the Southern Christian Leadership Conference, the State of Alabama, People for the Ethical Treatment of Animals, and the Illinois Catholic Conference urging the Court to grant review. Environmental groups such as Greenpeace and labor unions have also acknowledged the issue's importance for their activities. See OR Resp. Br. 7-

[11] The four "acts or threats of physical violence" to persons or property found by the jury (Pet. App. 160a) were also violations of the Hobbs Act, 18 U.S.C. § 1951(a). See Pet. App. 144a. Because the statute reaches only acts or threats of physical violence that are done "in furtherance of a plan or purpose" to violate Section 1951, these counts also required a showing of either "robbery" (not alleged here) or "extortion." See *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999).

[12] *All* of the remaining counts, moreover, were hotly disputed in the Seventh Circuit. That court declined to reach petitioners' challenges after it upheld the 21 Hobbs Act "extortion" counts. See Pet. App. 29a-30a.

11. Moreover, as the State of Alabama correctly points out, the meaning of "obtaining" "property" also has important ramifications for the scope of *official* extortion under the Hobbs Act.

D. *The Merits.* Respondents say that "obtaining" property means the same thing as "obtaining the disposal" of it (Opp. 18), but Congress left those words out of the statute. Nor is "obtain" synonymous with "cause to relinquish." Respondents also suggest that the property right petitioners "obtained" was their "agreement to surrender control," but that legal theory (nowhere reflected in the jury instructions) is covered by the independent requirement of "consent." See also *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) (rejecting argument that intangible right of "control" constitutes "property"). All of respondents' theories do violence to the language of Section 1951, depart from the common law meaning of "extortion," and ignore the rule of lenity. They also work a "sweeping expansion of federal criminal jurisdiction" (*id.* at 24) – especially given that the Hobbs Act covers conspiracies and attempts as well.

IV. The *Claiborne* Issue

The decision below substantially erodes the First Amendment safeguards required by *Claiborne* and conflicts with a decision of the Second Circuit. See Pet. 24-30; OR Pet. 26-30. The profound importance of this issue, previously acknowledged by two Members of this Court (see 510 U.S. at 265), is further underscored by the many *amici* who have voiced concern about this aspect of the Seventh Circuit's decision and urged the Court to review it. See also OR Resp. Br. 11-12.

Respondents say that *Claiborne*'s requirement of particularized findings was "dicta," but that is not how other courts – including the Second Circuit – have read this Court's instructions. Apart from that untenable assertion, respondents merely focus on supposed factual differences in the two cases that have nothing to do with this legal issue. Equally telling, respondents nowhere dispute our showing (Pet. 25, 29 & n.16) that the Seventh Circuit failed to enforce what we called the "second" principle of *Claiborne*: the requirement that any damages awarded be for losses proximately caused by violent conduct (as opposed

to conduct protected by the First Amendment).[13]

There was no way for the district court or the Seventh Circuit to discharge its "special obligation" to ensure that the jury in this case imposed liability for conduct on the part of petitioners that was unprotected by the First Amendment without knowing which acts were the basis for the "predicate acts" found by the jury (or whether petitioners, as opposed to other, unidentified people "associated with PLAN" had engaged in the liability-creating conduct). Pet. 27-28. Nor did Instruction 30 solve the problem, for reasons we have explained (Pet. 28-30). The same is true of the various other instructions cited by respondents.[14] And respondents nullified any protection that might have been afforded by Question 6 and Instruction 12 (see Opp. 26, 28; Pet. App. 160a) by representing to the jury that the "safe harbor" for peaceful protests and sit-ins "without more" did not apply unless a blockade "didn't keep anybody out" of a clinic. Tr. 4987; see also OR Pet. 3 n.3. Given respondents' heavy reliance on petitioners' *speech* as a basis for liability (Pet. 30 n.17; Opp. 1-5), the absence of the requisite safeguards all but assured that the judgment would rest on protected conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

---

[13] Respondents suggest that the First Amendment issue in this case is "fact-bound" (Opp. 6), but that is largely untrue. Whether the trial court's refusal to require the jury to make any particularized findings was consistent with the First Amendment is a pure issue of law, as is the question whether the Seventh Circuit properly disregarded the "second" *Claiborne* principle. And the lower courts' analysis of the "first" *Claiborne* principle (see Pet. 25, 28-30) is far less "fact-bound" than were the issues in *Claiborne* itself.

[14] Contrary to respondents' assertions (Opp. 26, 29), the verdict form did not "ensure[] damages were based only on the predicate crimes" and not on other overt acts. Question 9 of the verdict form referred the jury to Instruction 28 "for the definition of proximate cause"; the latter told the jury it could consider "any overt act." Pet. App. 152a, 161a. Equally wrong is respondents' suggestion that the district court made any "findings" under Rule 52(a) that support their arguments. Opp. 27. The language quoted by respondents in support of that assertion is from the jury instruction conference.

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MARCH 2002

FILED
MAR 4 2002
OFFICE OF THE CLERK

Nos. 01-1118 & 01-1119

In the Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CATHOLIC CONFERENCE OF ILLINOIS, HIS EMINENCE FRANCIS CARDINAL GEORGE, O.M.I. – ARCHBISHOP OF CHICAGO, CHAIRMAN, MOST REVEREND JOSEPH L. IMESCH – BISHOP OF JOLIET, MOST REVEREND WILTON D. GREGORY – BISHOP OF BELLEVILLE, MOST REVEREND GEORGE J. LUCAS – BISHOP OF SPRINGFIELD-IN-ILLINOIS, REVEREND MSGR. STEVEN ROHLFS – ADMINISTRATOR FOR DIOCESE OF PEORIA, DIRECTORS, IN SUPPORT OF PETITIONERS

JAMES A. SERRITELLA
JAMES C. GEOLY
Counsel of Record
KRISTIN J. LEMMON
BURKE, WARREN, MACKAY
& SERRITELLA, P.C.
330 N. Wabash Ave., 22nd Floor
Chicago, Illinois 60611
(312) 840-7000

Attorneys for *Amicus Curiae*

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

45 pp

QUESTIONS PRESENTED[1]

Whether under this Court's ruling in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982):

(a) The First Amendment protects citizens engaging in protected speech and expressive conduct from liability for the acts of others where no defendant is found to have specifically intended that others commit acts of violence;

(b) A defendant can be held to have threatened to commit an act of violence for saying specifically that he would engage in "non-violent direct action";

(c) To support a liability judgment the finder of fact is required to identify (1) the specific unprotected conduct from which liability arises, (2) the particular defendant who specifically intended to, and did commit or cause the unprotected conduct and (3) the specific damages caused only by such unprotected conduct and not by any other conduct.

---

[1] This brief addresses only the third question presented by the Scheidler defendants' petition, and the fourth question presented by Operation Rescue's petition. Amicus joins the briefs of the parties with respect to the other questions presented.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

REASONS FOR GRANTING THE PETITION 3

I. THE STANDARD FOR PUNISHING MIXED PROTECTED AND UNPROTECTED EXPRESSIVE ACTIVITIES REQUIRES THIS COURT'S IMMEDIATE ATTENTION 6

A. This Case Merits Review Because It Involves An Important Question of Federal Law Concerning The Fundamental First Amendment Rights Of The Public At Large 6

B. A Clear Standard Is Needed To Prevent The Chilling Of Activities Protected By The First Amendment 8

II. THE DECISION BELOW IS IN CONFLICT WITH THE CLEAR REQUIREMENTS OF *CLAIBORNE HARDWARE* 10

A. *Claiborne Hardware* Requires "Precision Of Regulation" Of Mixed Protected And Unprotected Expressive Activities, "Judged According To The Strictest Law" 10

B. The Courts Below Failed To Apply The "Precision Of Regulation" Standard 14

C. The Courts Below Failed To Judge "According To The Strictest Law" 18

CONCLUSION 20

APPENDIX ..... A-i

TABLE OF AUTHORITIES

PAGE(S)

Cases

Brandenburg v. Ohio, 395 U.S. 444 (1969) 11, 13

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 13

Cantwell v. State of Connecticut, 310 U.S. 296 (1940).....7

Edwards v. South Carolina, 372 U.S. 229 (1963).....7

Madsen v. Women's Health Ctr., 512 U.S. 753 (1994).....5

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)..... *passim*

NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449 (1958) 7

Nat'l Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 950 (N.D.Ill. 1991).....10

Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000) 3

Nat'l Org. for Women v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001) ..... *passim*

Nat'l Org. For Women, Inc. v. Scheidler, 510 U.S. 249, 265 (1994) 7, 12

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....9

Noto v. United States, 367 U.S. 290 (1961) 12

Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971).....7

Reves v. Ernst & Young, 507 U.S. 170 (1993) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....7

Scales v. United States, 367 U.S. 203 (1961).....13

Thornhill v. State of Alabama, 310 U.S. 88 (1940).....7

Constitutions and Statutes

U.S. CONST. Amend. I. 6

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*. ..... *passim*

Hobbs Act, 18 U.S.C. § 1951, *et seq*.....16

Sup. Ct. Rule 10 6

Other Authorities

POPE JOHN PAUL II, EVANGELIUM VITAE (March 25, 1995) (excerpts).....2, 3, 7

Steve Kloehn, *Cardinal Takes Lead in Abortion Protest*, CHICAGO TRIBUNE, June 27, 1999 4

Statement of Francis Cardinal George, O.M.I. re: Prayer Vigil at Centro Medico Abortion Clinic, June 25, 1999.....4

Chicago N.O.W., *Chicago N.O.W. Challenges Cardinal Francis George to Stop Health Center Demonstrations*, undated press release..... 4-5

INTEREST OF THE AMICUS CURIAE[2]

The Catholic Conference of Illinois ("the Catholic Conference"), an Illinois not-for profit corporation, is an association of the six Roman Catholic dioceses in the State of Illinois. The chairman of the board of directors of the Catholic Conference is His Eminence, Francis Cardinal George, O.M.I., Archbishop of Chicago. The remaining five diocesan bishops in Illinois also serve on the board: Most Rev. Joseph L. Imesch, Bishop of Joliet; Most Rev. Wilton D. Gregory, Bishop of Belleville; Rev. Msgr. Steven Rohlfs, Administrator for the Diocese of Peoria[3]; Most Rev. Thomas G. Doran, Bishop of Rockford; and Most Rev. George Lucas, Bishop of Springfield in Illinois.

The purposes of the Catholic Conference include the promotion of projects common to the six member dioceses, the advocacy of public policy positions which grow out of the Catholic Church's religious, moral and ethical teachings and the education of the public on matters of special concern to the nearly four million Roman Catholics in Illinois. The Catholic Conference has long been involved in the struggle for First

---

[2] This brief was not written in whole or in part by counsel for a party and no one other than the Catholic Conference and its members made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

[3] When a see is vacant, the administrator of the diocese in question serves in place of the diocesan bishop on the board of directors of the Catholic Conference.

Amendment freedoms for all Americans and has frequently submitted briefs *amicus curiae* to state and federal courts at all levels.

The Catholic Conference has a deep and continuing interest in the question presented in this case. The indiscriminate application of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.* ("RICO"), to individuals and groups organized to advocate political, moral or religious causes threatens the rights of the Catholic Conference and of all citizens to free speech, free association, free assembly and the free exercise of religion. It not only punishes protected activity after the fact, but also chills protected activity by those who fear the kind of reprisal that this litigation has become. This grave danger warrants this Court's immediate review of the decision below.

The Catholic Conference's interest in this case is therefore twofold. First is the Catholic Conference's deeply and sincerely held religious belief that abortion constitutes the unjustified killing of an innocent human being. This longstanding teaching of the Roman Catholic Church is derived from the Fifth Commandment, "Thou shalt not kill." As Pope John Paul II has observed, "abortion . . . always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being." Pope John Paul II, EVANGELIUM VITAE 62 (March 25, 1995) (See Appendix p. A-6)(hereinafter referred to as "Appendix p. A-__").

Second, the Catholic Conference has a direct interest in ensuring that all opponents of abortion be permitted access to the "marketplace of ideas" on an equal footing

with those who advocate legal abortion. As part of their exercise of faith, Catholics are called as witnesses to proclaim that "[a]bortion and euthanasia are . . . crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection.*" EVANGELIUM VITAE 73 (emphasis in original)(Appendix p. A-6). The Catholic Conference is therefore alarmed at the possibility that its activities advocating the end of abortion, inspired by faith and protected by the Constitution, could somehow be construed as a "pattern of racketeering activity" under RICO. Indeed, in a rare written opinion explaining the decision to grant the Catholic Conference's motion below for leave to file a brief *amicus curiae*, the Seventh Circuit recognized the danger posed to this Amicus as an organization "faced with the same kind of civil RICO claims that formed the basis of the judgment against the appellants." *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.).

REASONS FOR GRANTING THE PETITION

This case requires the Court's immediate review because the decision below, branding pro-life organizers as "racketeers" based on the conduct of others, has created an atmosphere of fear and intimidation that has chilled the exercise of First Amendment rights. The efforts to silence these often controversial voices began as soon as Plaintiffs prevailed in the district court. For example, in 1999, Amicus Francis Cardinal George, O.M.I., Archbishop of Chicago, led a peaceful prayer

vigil with nearly 1000 people, but no speeches or signs, in front of a Chicago abortion clinic.[4] His announcement stated, "[Pope John Paul II] notes [in EVANGELIUM VITAE] that the 'support and promotion of human life must be accomplished through the service of charity, which finds expression in personal witness, various forms of volunteer work, social activity and political commitment. . . .'I will be joining hundreds of others -- not to protest -- but to promote a 'culture of life.'"[5]

In response, the Chicago chapter of Plaintiff N.O.W. released the following statement:

> One way to immediately stop anti-abortion violence and send the message that harassment and terrorism are not acceptable is to ***stop demonstrating, protesting, and holding prayer vigils*** outside of health centers that provide reproductive health care and abortion services. *** 900 people marching down the street and stopping in front of a clinic to pray is confrontational. ***Cardinal George and the participants of Saturday's demonstration have a right to their opinions, however, gathering***

[4] Steve Kloehn, *Cardinal Takes Lead in Abortion Protest*, CHICAGO TRIBUNE, June 27, 1999, Addendum 1, Revised and Corrected Scheidler Defendants' Memorandum in Support of Their Motion for Judgment as a Matter of Law, No. 86C7888 (filed September 16, 1999) (Appendix p. A-9 – A-13).

[5] *Statement of Francis Cardinal George, O.M.I. re: Prayer Vigil at Centro Medico Abortion Clinic* (Appendix p. A-14).

> ***outside of a clinic is inappropriate and an act of aggression.***[6]

N.O.W. suggests that Cardinal George and his fellow citizens are permitted to *have* their own opinions, as long as they do not exercise their constitutional right to *express* those opinions publicly.[7] Unfortunately, the linguistic contortion required to characterize peaceful prayer as "an act of aggression" is no more absurd than calling it extortion or a "pattern of racketeering activity." RICO was intended to combat organized crime. Instead, it has been twisted into a sword of Damocles, threatening every advocate who speaks out against those who possess the resources for unlimited litigation. By broadening RICO to sweep in the petty trespasses that arise in every significant advocacy movement, the lower courts have threatened to turn

[6] Chicago N.O.W., *Chicago N.O.W. Challenges Cardinal Francis George to Stop Health Center Demonstrations*, undated press release (emphasis added), Addendum 1, Revised and Corrected Scheidler Defendants' Memorandum in Support of Their Motion for Judgment as a Matter of Law (filed September 16, 1999) (Appendix p. A-16).

[7] It is ironic that an ostensible civil rights group like N.O.W. would argue so vociferously *against* the exercise of First Amendment freedoms. Of course, the controversy over abortion has skewed the discussion of many of the legal issues it has touched. As Justice Scalia has lamented, "the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting).

peaceful protest into a "pattern of racketeering activity." This threat chills protected expression, and is therefore prohibited under the First Amendment. The Catholic Conference urges this Court to grant the respective Petitions and remove this threat to freedom.

I. THE STANDARD FOR PUNISHING MIXED PROTECTED AND UNPROTECTED EXPRESSIVE ACTIVITIES REQUIRES THIS COURT'S IMMEDIATE ATTENTION

A. This Case Merits Review Because It Involves An Important Question of Federal Law Concerning The Fundamental First Amendment Rights Of The Public At Large

This court should grant a petition for certiorari when review is necessary to prevent the loss of precious constitutional freedoms, for there can be no more "important question of federal law." *See* Sup. Ct. Rule 10(c). The rights protected by the First Amendment[8] are fundamental, deserving of the utmost protection. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("values enshrined in the First Amendment plainly rank high 'in the scale of our national values'"). The application of RICO to any advocacy movement implicates the freedoms protected by the First

[8] "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. Amend. I.

Amendment. *See Nat'l Org. For Women, Inc. v. Scheidler*, 510 U.S. 249, 265 (1994) (Souter, J. concurring)("RICO actions could deter protected advocacy . . . courts applying RICO [should] bear in mind the First Amendment interests that could be at stake"). Picketing, leafleting, marching and protesting are time-honored methods of public advocacy. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)(pamphleteering); *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (marches and assemblies); *Thornhill v. State of Alabama*, 310 U.S. 88, 104-05 (1940)(picketing). Advocates also have the right to associate with each other, plan their activities, and assemble in groups to deliver their message. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (right of association is "implicit in the right to engage in activities protected by the First Amendment"); *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Moreover, the "fundamental" right of free exercise of religion would be meaningless without the concurrent freedom to communicate religious and moral beliefs. *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940). Catholics especially are called as witnesses to proclaim publicly that "[a]bortion and euthanasia are . . . crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a ***grave and clear obligation to oppose them by conscientious objection***." Pope John Paul II, EVANGELIUM VITAE 73 (March 25, 1995) (emphasis in original)(Appendix p. A-10).

This case involves not only the particular defendants' loss of these precious rights, but the proclamation to all that anyone who enters the public square on the controversial issue of abortion risks a racketeering conviction. That threat is now chilling the exercise of First Amendment freedoms and must be removed.

B. A Clear Standard Is Needed To Prevent The Chilling Of Activities Protected By The First Amendment

The lower courts in this case held that RICO liability could be imposed on protest organizers who neither intended, nor knew of, the illegal acts of other persons who happened to attend protests or rallies. The courts below also failed to require jury findings from which a reviewing court could be reasonably certain that only unprotected conduct, specifically intended by these particular defendants, was being punished. The courts below further failed to require specific findings indicating that the damages assessed flowed only from such unprotected conduct, and were only charged to the particular defendant found to have caused the damages in question (See Section II, below).

In the wake of the court of appeals' decision, no citizen wishing to speak out on a controversial issue can feel secure that his or her exercise of the right to free speech and association will go unpunished. If the citizen "conspires" with others to get their message out, and someone who attends a rally or a protest happens to break the law, the citizen is now facing RICO liability.

Thus, N.O.W.'s characterization of Cardinal George's prayer vigil as an "act of aggression" can only be seen as a none too subtle threat intended to deter him from expressing his religious and public policy views. Even though that threat will not silence the Archbishop of Chicago, after the court of appeals' decision, it is likely to silence many others who have the same right to free expression and association as the Archbishop, but are less able to withstand the pro-abortion movement's verbal and legal assaults.

Fortunately, this Court has long recognized that threats to First Amendment freedoms must be considered against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Court can only safeguard this "robust" debate by articulating a clear and strict standard applying *Claiborne Hardware* to RICO and other actions aimed at mixed protected and unprotected expressive activities. Review is therefore necessary not only to correct the error below, but more importantly to remove the chill that has descended upon countless advocates for a variety of causes; a chill that descends from the now clear threat that their expressive conduct may be branded as a "pattern of racketeering activity."[9]

---

[9] The district court recognized that at the core of the abortion protest movement is its "ultimate objective - legislation

II. THE DECISION BELOW IS IN CONFLICT WITH THE CLEAR REQUIREMENTS OF *CLAIBORNE HARDWARE*

A. *Claiborne Hardware* Requires "Precision Of Regulation" Of Mixed Protected And Unprotected Expressive Activities, "Judged According To The Strictest Law"

Where the speech and conduct at issue involve a mix of protected and unprotected expressive activity, the court has a duty to ensure that only unprotected activities are punished or deterred. The seminal case is *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where this Court reviewed a judgment against the leaders of a civil rights boycott. There was some violence, particularly against violators of the boycott,[10]

---

prohibiting abortions." *Nat'l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 950 (N.D.Ill. 1991), *overruled on other grounds*, 510 U.S. 249 (1994). Similarly, the court of appeals recognized that "'[p]articipants in the protest missions engaged in a substantial amount of protected speech, including efforts to persuade clinic doctors and staff to cease performing abortions." *Nat'l Org. for Women v. Scheidler*, 267 F.3d 687, 693 (7th Cir. 2001).

[10] A group known as the "Black Hats" was formed to enforce the boycott activities and to stand outside of stores to identify, and arguably to intimidate, black customers who entered in violation of the boycott. *Claiborne Hardware*, 458 U.S. at 903-04. Some described the Black Hats as a paramilitary organization. *Id.* at 903 n. 34. Some members of this group committed acts of violence. *Id.* For example, enforcers of the boycott fired shots at a house, threw a brick

but in general the boycott consisted of nonviolent meetings, speeches and picketing. *Id.* at 903. On the other hand, boycott leader Charles Evers did publicly threaten, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

This Court held that although the First Amendment does not create "the right to commit crime," courts are obliged to "examine critically the basis on which the liability was imposed." *Id.* at 895, 915. Speech is protected, even where it "may embarrass others or coerce them into action." *Id.* at 910. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(permitting prohibition of speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

The Court also held that, where the First Amendment is implicated, even the regulation of *unprotected* conduct requires a "precision of regulation." *Claiborne Hardware*, 458 U.S. at 916-17 (the "presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages").[11] Moreover, a court

---

through a windshield and stripped a man of his clothing and publicly whipped him. *Id.* at 903-05.

[11] The same is true under RICO. As Justice Souter observed, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in

may not award damages proximately resulting from "the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." *Id.* at 918.[12]

Next, the Court reviewed associational liability under the "precision of regulation" standard:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a ***specific intent*** to further those illegal aims.

Id. at 920 (emphasis added). Moreover, "this intent must be judged 'according to the strictest law.'" *Id.* at 919.[13] If conspiracy is alleged, the plaintiff must also

---

protected expression." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J. concurring).

[12] The same requirement for precision of regulation applies to injunctions. The injunction must "restrain only unlawful conduct and the persons responsible for conduct of that character." *Claiborne Hardware*, 458 U.S. 886, 924, fn. 67. *See also Madsen*, 512 U.S. at 767 (requirement that "an injunction burden no more speech than necessary exemplifies precision of regulation").

[13] Citing *Noto v. United States*, 367 U.S. 290, 299-300 (1961)("criminal intent . . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be

plead and prove the specific intent to enter into the conspiracy. *Id.*[14]

Turning to the conduct that supposedly supported liability in *Claiborne Hardware*, this Court noted that the lower court "broadly asserted - without differentiation" (*Id.* at 921) that the defendants had committed tortious acts to enforce the boycott, but that "[t]here is nothing unlawful in standing outside of a store and recording names. . . mere association with [the store watchers or the Black Hats] -- absent a ***specific intent to further an unlawful aim embraced by that group*** -- is an insufficient predicate for liability." *Id.* at 925-26 (emphasis added). Even Evers' threat to "break your damn neck" did not "transcend the bounds of protected speech set forth in *Brandenburg*." *Id.* at 902, 928.[15]

Lastly, this Court in *Claiborne Hardware* required a detailed record and specific fact findings so that the lower court decision could be judged according to the "strictest law":

---

punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share"). *See also Scales v. United States*, 367 U.S. 203, 229 (1961) (to punish association, there must be "clear proof that a defendant specifically intended to accomplish the aims of the organization by resort to violence")(citation omitted).

[14] *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (to establish a conspiracy under 42 U.S.C. § 1885(3), plaintiff must allege actual race or class-based animus).

[15] *Cf. Brandenburg v. Ohio*, 395 U.S. 444 (1969).

> [A] characterization [as a violent conspiracy] must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. *Id.* at 933-34.

B. The Courts Below Failed To Apply The "Precision Of Regulation" Standard

The application of RICO to these circumstances smacks of the "guilt by association" prohibited in *Claiborne Hardware*. *See* 458 U.S. at 918-920. Indeed, *Claiborne Hardware* teaches that protected activity cannot serve as any of the essential elements of the cause of action.[16] *Id.* at 916-17 (limiting "the grounds that may give rise to damages liability and . . . the persons who may be held accountable"). After all, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." *Id.* at 908. *But see Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) ("Of course 'outsiders' may be liable . . . if

[16] Plaintiffs' conspiracy claim introduces another protected association-- the "agreement" -- which further compounds the problem of "precisely" regulating only unprotected activities.

they are 'associated with' an enterprise and participate in the conduct of its affairs").[17]

Nonetheless, plaintiffs were permitted to introduce evidence that persons not under the defendants' control were somehow caused to take illegal actions by defendants' exhortations, even when those exhortations contained no explicit references to violence.[18] The plaintiffs also were permitted to introduce evidence of heinous crimes, including bombings and murders, committed by persons linked to the defendants only by the fact that they both sought an end to abortion. *Cf. Claiborne Hardware*, 458 U.S. at 930-31 (no vicarious

[17] As even the court of appeals acknowledged, "*Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN" 267 F.3d at 703.

[18] The court of appeals attempts to link Defendant Scheidler to the "illegal aims" of PLAN with a letter he wrote to abortion clinics, but Scheidler's letter specifically stated that clinics that remained open during a proposed "truce" "would be subjected to 'non-violent direct action.'" 267 F.3d at 695. In contrast, Evers' *protected* speeches in *Claiborne* contained explicit exhortations to commit violence against violators of the boycott, including the statement, "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." 458 U.S. at 902, 928. Accordingly, the court of appeals has relied directly on Scheidler's *protected* speech to impose associational liability. *Cf. Claiborne Hardware*, 458 U.S. at 916-17.

liability permitted without "evidence that the NAACP ratified -- or even had specific knowledge of -- any of the acts of violence or threats of discipline. . . .").

Indeed, the plaintiffs were even allowed to claim that they "felt threatened" by objectively non-threatening and non-violent protest activities because of violence in other parts of the country, totally unconnected to the defendants. By this approach, the plaintiffs converted petty trespass into Hobbs Act extortion, the crucial racketeering predicate in this case. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include violations of the Hobbs Act, 18 U.S.C. § 1951, *et seq.*).

Where plaintiffs did address these particular defendants, they were permitted to introduce volumes of evidence concerning undeniably *protected* activities, such as speeches, rallies, prayer vigils, conferences, leafleting and other activities[19] that are essential to an advocacy movement, all to show the collective guilt of the defendants for any illegal act carried out in the name of their cause.

On the other hand, the district court did not permit defendants to introduce evidence of their actual intent,

---

[19] Defendant Scheidler's letter, specifically stating that his group will conduct "non-violent" activities is a typical example. The court of appeals in holding that Scheidler's letters were "true threats" dismisses the obvious meaning of these words by referring to them as "a catch-phrase [defendants] frequently used for their activities." 267 F.3d at 695, 702.

in response to the circumstantial evidence introduced by the plaintiffs. Thus, while there undoubtedly were agreements among some defendants to hold protests that could involve petty trespasses, there appears to have been no evidence that these defendants specifically intended to (1) commit, or have others commit, a "pattern of racketeering activity"; or (2) "facilitate" the conduct of PLAN through a pattern of racketeering activity.

The court of appeals brushes aside this lack of evidence with the conclusory assertion that the record contained evidence of "hundreds of acts committed by the defendants," but the court's own examples betray the court's error, for each example relies on a description of what unnamed "protesters" did; not what these defendants did. *See Nat'l Org. for Women v. Scheidler*, 267 F.3d at 694 ("protesters pressed four clinic staff members up against a glass entranceway"); *Id.* ("protesters grabbed at a patient's arms and legs," causing a surgical incision to reopen); *Id.* ("protestors entered clinic and destroyed medical equipment"); *Id.* ("protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics"). *See also* 267 F.3d at 702. *Claiborne Hardware* requires precision of regulation by which the particular defendant is proven to have specific intent to cause specific unprotected conduct, in turn proximately causing specifically proven damages. Evidence of what "protesters" did is irrelevant and insufficient to satisfy this "heavy" burden. *Claiborne Hardware*, 458 U.S. at 918, 934.

C. The Courts Below Failed To Judge "According To The Strictest Law"

Applying *Claiborne Hardware* to RICO, the trier of fact is constitutionally required to identify, as to each defendant, which specific acts or statements were relied on to find specific intent, and every other element of RICO liability. Similarly, the trier of fact is required to indicate the specific basis of any damage award, including identifying which act caused the damage, to ensure that "[o]nly those losses proximately caused by unlawful conduct may be recovered." *See Claiborne Hardware*, 458 U.S. at 918.

The defense asked the district court to require that "the plaintiff . . . list in the special interrogatories each particular incident they allege to constitute an act of force, threat, or violence sufficient to constitute extortion," but the judge replied, "Absolutely not. Absolutely not." *Trans.* 4495, ll. 15-19.

Although the district court ultimately included a general jury instruction requiring a finding of specific intent,[20] it used a verdict form which asked the jury precisely the wrong questions. The jury was asked to find whether "any defendant, *or any other person associated with PLAN*" violated RICO. Verdict Form,

---

[20] Instruction No. 30 read: "In order to find defendants liable, you must conclude . . . that the defendants held a specific intent to further those illegal objectives." Trans. at 4949, ll. 7-12. *See also* 267 F.3d at 705.

question 4 (emphasis added).[21] The "jury did not state which defendants did these acts or when they occurred, only the total number of acts." *Nat'l Org. for Women v. Scheidler*, Memorandum Opinion and Order, p. 18 (N.D.Ill. July 16, 1999). Indeed, the jury did not even decide whether the acts were committed by a defendant at all, as opposed to "any other person."

The court of appeals affirmed, assuming that the jury made the constitutionally required specific fact findings because Instruction 30 told it to do so. 267 F.3d. at 704-5. Thus, after paying lip service to *Claiborne Hardware*, the court of appeals discarded that case's core holding by permitting a general instruction on intent to substitute for the clear, factual findings needed to determine what conduct, and which defendants, the jury was punishing.

Of course, the very purpose of the *Claiborne Hardware* standard was to ensure that a reviewing court could readily determine which specific acts of a particular defendant were subject to punishment, and which specific penalty was attributable to those acts. For all we know, the jurors may well have tried to

---

[21] In response, the jury found that the defendants, or any other unidentified person associated with them, committed 21 unidentified acts or threats involving extortion in violation of federal law, 25 unidentified acts or threats involving extortion in violation of state law, 25 unidentified attempts or conspiracy to do any of these acts, and 4 unidentified acts or threats of physical violence to persons or property. See Verdict Form, question 4(a)-(h). There is no finding tying any specific defendants to any specific act.

follow Instruction No. 30, but they left no ascertainable record that they did so. Indeed, the special verdict form, which constitutes the jury's actual findings of fact, indicates the opposite, for it contains nothing but vague and aggregate findings. It was improper to *assume* that the exacting standards of *Claiborne Hardware* were met, no matter how "confident" the court of appeals was. *Scheidler*, 267 F.3d. at 705. The trier of fact was required, but failed, to make explicit findings available for scrutiny on appeal. The court of appeals was required, but failed, to conduct a de novo review, "according to the strictest law." Review should be granted so that these threats to free expression and association can be eradicated.

CONCLUSION

For all the foregoing reasons, this court should grant the respective petitions for certiorari.

Respectfully Submitted,

James A. Serritella
James C. Geoly (*Counsel of Record*)
Kristin J. Lemmon
BURKE, WARREN, MACKAY & SERRITELLA, P.C.
330 N. Wabash Avenue, 22nd Floor
Chicago, Illinois 60611-3607
(312) 840-7000

Attorneys for Amicus Curiae

APPENDIX

TABLE OF CONTENTS
TO
APPENDIX

Page

1. Excerpts from POPE JOHN PAUL II, EVANGELIUM VITAE (March 25, 1995)..... A-1

2. Steve Kloehn, Cardinal Takes Lead in Abortion Protest, CHICAGO TRIBUNE, June 27, 1999 ..... A-9

3. *Statement of Francis Cardinal George, O.M.I. re: Prayer Vigil at Centro Medico Abortion Clinic,* June 25, 1999..... A-14

4. Chicago N.O.W., *Chicago N. O. W. Challenges Cardinal Francis George to Stop Health Center Demonstrations,* undated press release..... A-16

A-1

Encyclical Letter

THE GOSPEL OF LIFE

Evangelium Vitae

JOHN PAUL II
TO THE BISHOPS
PRIESTS AND DEACONS
MEN AND WOMEN RELIGIOUS
LAY FAITHFUL
AND ALL PEOPLE OF GOOD WILL
ON THE VALUE AND INVIOLABILITY
OF HUMAN LIFE

"Your eyes beheld my unformed substance" (*Ps* 139:16): the *unspeakable crime of abortion*

58. Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Second Vatican Council defines abortion, together with infanticide, as an "unspeakable crime."[54]

But today, in many people's consciences, the perception of its gravity has become progressively obscured. The acceptance of abortion in the popular mind, in behavior and even in law itself, is a telling sign of an extremely dangerous crisis of the moral sense, which is becoming more and more incapable of distinguishing between good and evil, even when the fundamental right to life is at stake. Given such a grave situation, we need now more than ever to have the courage to look the truth in the eye and to *call things by their proper name*, without yielding to convenient compromises or to the temptation of self-deception. In this regard the reproach of the Prophet is extremely straightforward: "Woe to those who call evil good and good evil, who put darkness for light and light for darkness" (*Is* 5:20). Especially in the case of abortion there is a widespread use of ambiguous terminology, such as "interruption of pregnancy," which tends to hide abortion's true nature and to attenuate its

---

[54] Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, 51: "Abortus necnon infanticidium nefanda sunt cimina."

seriousness in public opinion. Perhaps this linguistic phenomenon is itself a symptom of an uneasiness of conscience. But no word has the power to change the reality of things: procured abortion is *the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth.*

The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely *innocent* could be imagined. In no way could this human being ever be considered an aggressor, much less an unjust aggressor! He or she is *weak*, defenseless, even to the point of lacking that minimal form of defense consisting in the poignant power of a newborn baby's cries and tears. The unborn child is *totally entrusted* to the protection and care of the woman carrying him or her in the womb. And yet sometimes it is precisely the mother herself who makes the decision and asks for the child to be eliminated, and who then goes about having it done.

It is true that the decision to have an abortion is often tragic and painful for the mother, insofar as the decision to rid herself of the fruit of conception is not made for purely selfish reasons or out of convenience, but out of a desire to protect certain important values such as her own health or a decent standard of living for the other members of the family. Sometimes it is feared that the child to be born would live in such conditions

that it would be better if the birth did not take place. Nevertheless, these reasons and others like them, however serious and tragic, *can never justify the deliberate killing of an innocent human being*.

***

62. The more recent *Papal Magisterium* has vigorously reaffirmed this common doctrine. Pius XI in particular, in his Encyclical *Casti Connubu*, rejected the specious justifications of abortion.[65] Pius XII excluded all direct abortion, i.e., every act tending directly to destroy human life in the womb "whether such destruction is intended as an end or only as a means to an end."[66] John XXIII reaffirmed that human life is sacred because "from its very beginning it directly involves God's creative activity."[67] The Second Vatican Council, as mentioned earlier, sternly condemned abortion: "From the moment of its conception life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes."[68]

---

[65] Cf. Encylical Letter *Casti Connubii* (December 31, 1930), II: *AAS* 22 (1930), 562-592.

[66] Address to the Biomedical Association "San Luca" (November 12, 1944): *Discorsi a Radionessaggi*, VI (1944-1945), 191; cf. Address to the Italian Catholic Union of Midwives (October 29, 1951), no. 2: *AAS* 43 (1951), 838.

[67] Encyclical Letter *Mater et Magistra* (May 15, 1961), 3: *AAS* 53 (1961), 447.

[68] Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, 51.

The *Church's canonical discipline*, from the earliest centuries, has inflicted penal sanctions on those guilty of abortion. This practice, with more or less severe penalties, has been confirmed in various periods of history. The 1917 *Code of Canon Law* punished abortion with excommunication.[69] The revised canonical legislation continues this tradition when it decrees that "a person who actually procures an abortion incurs automatic (*latae sententiae*) excommunication."[70] The excommunication affects all those who commit this crime with knowledge of the penalty attached, and thus includes those accomplices without whose help the crime would not have been committed.[71] By this reiterated sanction, the Church makes clear that abortion is a most serious and dangerous crime, thereby encouraging those who commit it to seek without delay the path of conversion. In the Church the purpose of the penalty of excommunication is to make an individual fully aware of the gravity of a certain sin and then to foster genuine conversion and repentance.

Given such unanimity in the doctrinal and disciplinary tradition of the Church, Paul VI was able to declare that this tradition is unchanged and

---

[69] Canon 2350, § 1.

[70] *Code of Canon Law*, canon 1398; cf. *Code of Canons of the Eastern Churches*, canon 1450, § 2.

[71] Cf. *ibid.*, canon 1329; also *Code of Canons of the Eastern Churches*, canon 1417.

unchangeable.[72] Therefore, by the authority which Christ conferred upon Peter and his Successors, in communion with the bishops--who on various occasions have condemned abortion and who in the aforementioned consultation, albeit dispersed throughout the world, have shown unanimous agreement concerning this doctrine *declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder*, since it is the deliberate killing of an innocent human being. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium.[73]

No circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church.

***

73. Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection*. From the very beginnings of the

---

[72] Cf. Address to the National Congress of Italian jurists (December 9, 1972): *AAS* 64 (1972), 777; Encyclical Letter *Humanae Vitae* (July 25, 1968), 14: *AAS* 60 (1968), 490.

[73] Cf. SECOND VATICAN ECUMENICAL COUNCIL, Dogmatic Constitution on the Church *Lumen Gentium*, 25.

Church, the apostolic preaching reminded Christians of their duty to obey legitimately constituted public authorities (cf. *Rom* 13:7; 1 *Pet* 2:13-14), but at the same time it firmly warned that "we must obey God rather than men" (*Acts* 5:29). In the Old Testament, precisely in regard to threats against life, we find a significant example of resistance to the unjust command of those in authority. After Pharaoh ordered the killing of all newborn males, the Hebrew midwives refused, "They did not do as the king of Egypt commanded them, but let the male children live" (*Ex* 1:17). But the ultimate reason for their action should be noted: "*the midwives feared God*" (*ibid.*) It is precisely from obedience to God-to whom alone is due that fear which is acknowledgment of his absolute sovereignty--that the strength and the courage to resist unjust human laws are born. It is the strength and the courage of those prepared even to be imprisoned or put to the sword, in the certainty that this is what makes for "the endurance and faith of the saints" (*Rev* 13:10).

In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to "take part in a propaganda campaign in favor of such a law, or vote for it."[98]

A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the

---

[98] CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Declaration on Procured Abortion* (November 18, 1984), no. 22: *AAS* 66 (1974), 744.

number of authorized abortions, in place of a more permissive law already passed or ready to be voted on. Such cases are not infrequent. It is a fact that while in some parts of the world there continue to be campaigns to introduce laws favoring abortion, often supported by powerful international organizations, in other nations--particularly those which have already experienced the bitter fruits of such permissive legislation--there are growing signs of a rethinking in this matter. In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.

Steve Kloehn, *Cardinal takes Lead in Abortion* Protest, CHICAGO TRIBUNE, June 27, 1999

Nearly 1000, people clustered around Cardinal Francis George outside a Humboldt Park abortion clinic Saturday morning, praying the rosary on the hot macadam of Fullerton Avenue.

The peaceful event, which began with mass at nearby St. Sylvester Church and included an eight-block procession from the church to the clinic and back, was a sign of renewed visibility by Catholic abortion opponents.

George's appearance marked the first for a Chicago archbishop at an event outside an abortion clinic, though the cardinals of Los Angeles and New York have participated in similar events. George said Saturday that he would consider future invitations to lead such vigils.

With no speeches, signs, or slogans, the 45-minute vigil outside the Centro Medico Panamericano clinic also suggested a strategy that might reinvigorate abortion opponents after a spate of shootings, clinic bombings and court decisions over the last four years gave the movement a black eye.

"As these events become clearly prayerful, the potential for violence decreases," George said Saturday. "If it's

entirely prayerful, I think it's appropriate for the bishop to be present."

Longtime activists who came from around the state to take part in the vigil embraced that idea.

"It's against the natural human instinct to think that walking in silence and prayer, while people are yelling at you, can work. From the outside, it seems like the people who yell loudest win," said Suzanne Abdalla, 26, of Rockford. "But I think something went on inside that is far greater than that today."

About 50 counterprotesters did show up, carrying signs and chanting slogans, but they were outnumbered by Chicago police on foot and horseback. Police shut down Fullerton Avenue for the procession and vigil, and set up a cordon between the two groups. No arrests were reported.

The tenor of the event did not sway abortion-rights proponents.

"Simply standing here and praying has a depressing effect on any woman who is going in for a pap smear, for birth control, for any reason," said Carol Hayse of Chicago, who protested with the Emergency Clinic Defense Coalition. "And these kinds of events set the stage for all the abortion clinic bombings and shootings."

Nobody went into or out of the Northwest Side clinic in the hours surrounding the vigil.

On both sides of the street, residents living above the shops and offices hung out of windows watching the event, while a small crowd of bystanders gathered on the sidewalk.

"I'm definitely pro-choice, but the pro-choice people don't seem very well organized," said David Albin, who walked over from his nearby Logan Square neighborhood to get a look. "It seems pretty peaceful. And the police turnout is amazing."

The four-hour event began with a mass that filled the steamy nave of St. Sylvester Church and spilled out onto the sidewalk, where more than 200 worshipers listened to the bilingual service on speakers.

In his homily, George implored the crowed to focus its attention on prayer, and to bring "an attitude of welcome and love" to the clinic site.

"If you came with anger in your heart toward anyone who would do or justify an abortion, leave it behind. Leave it in the church.... The Lord doesn't need loud cries or amplification," the cardinal said. "If we pray well, we can transform the entire witness that surrounds this issue."

George also questioned the forces behind abortion, especially economic decisions that he said continue to push modern culture to "replace living people with dead things."

"Most of you here are not very rich. Most of those getting abortions at the clinic are not very rich," he said. "So we must ask: Where are the rich?"

After the mass, when asked whether he wished more mainstream Catholics would take an active role in opposing abortion, George replied, "That is the mainstream of Catholics who you saw here today."

George said he would consider attending future prayer vigils at abortion clinics, but stressed that he would have to be certain that prayer would be the only activity, and be comfortable with the event sponsor's record.

July McCreevy, director of the Chicago chapter of Helpers of God's Precious Infants and an organizer of Saturday's event, called the cardinal's presence "blessed."

"It's just such a calming, serene sound," she said as the crowd repeated the Hail Mary prayer. "It's a lovely day."

Clinic officials did not respond to requests for comment last week, but on Saturday, reporters received a faxed statement bearing the logo of Centro Medico Panamericano clinic and the signature line "MANAGEMENT."

"There are other social issues in this community that must be addressed. To name a few, we would like Cardinal George to assist in keeping our streets safe by eliminating the drug trafficking, single motherhood, violent gang and poverty issues in our community," the statement said.

STATEMENT OF FRANCIS CARDINAL GEORGE, O.M.I.

RE: Prayer Vigil at Centro Medico Abortion Clinic
June 25, 1999

Almost everyone regards abortion as a tragedy, even those who see it as a necessary evil. When tragedies occur, people should pray. A number of people will be praying on Saturday morning.

In Pope John Paul II's 1995 encyclical on pro-life issues, The Gospel of Life, he notes that the "support and promotion of human life must be accomplished through the service of charity, which finds expression in personal witness, various forms of volunteer work, social activity and political commitment. This is a particularly pressing need at the present time, when the 'culture of death' so forcefully opposes the 'culture of life' and often seems to have the upper hand."

To meet this "pressing need" I will participate in the "Prayer Vigil for Life" at the Centro Medico Pan Americano abortion clinic on Saturday morning. I will not be leading a protest. I will be joining hundreds of others - not to protest - but to promote a "culture of life." We will pray for all who are harmed by abortion: mothers, their unborn children, fathers, families, medical personnel, and society. We will pray for an

increase in respect for the dignity and value of each human life, especially the weakest and most defenseless.

I encourage those who wish to pray in a peaceful way to join me. Please do not bring signs or pickets - bring only your desire to give peaceful witness to our love and deep respect for mothers and their children.

I would also like to say a word to any woman contemplating an abortion at the Centro Medico clinic or any other clinic: the services of the Catholic Church are available to you. We understand that you may feel that abortion is your only choice. But there are alternatives; we will help you choose life. Please call the 24-hour Catholic Charities Maternity Hotline at 1-800-CARE-002.

CHICAGO NOW PRESS RELEASE

Chicago NOW Challenges Cardinal Francis George to Stop Health Center Demonstrations

One way to immediately stop anti-abortion violence and send the message that harassment and terrorism are not acceptable is to stop demonstrating, protesting, and holding prayer vigils outside of health centers that provide reproductive health care and abortion services. Activities that take place outside of clinic doors and harassing and intimidating to the patients seeking health services and to the staff who work in the clinic.

Anti-abortion supporters are once again trying to fool the citizens of Chicago and the American public into believing that their protests are peaceful and non-confrontational. 900 people marching down the street and stopping in front of a clinic to pray is confrontational. Cardinal George and the participants of Saturday's demonstration have a right to their opinions, however, gathering outside of a clinic is inappropriate and an act of aggression.

Anti-abortion supporters know that the majority of American citizens support a woman's right to choose. They know that legislators will not send women back to times of unsafe and illegal back alley abortions. We live in a democracy, anti-abortion supporters would be better to take their message to the steps of Congress.

MOTION FILED
MAR 4 2002

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

October Term, 2001

Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc.,
Petitioners

v.

National Organization for Women, Inc., et al.
Respondents

Motion of Seamless Garment Network, Sojourners, Southern Christian Leadership Conference, et al., and Brief Amicus Curiae in Support of Granting the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Robert A. Destro
Catholic University of America
Columbus School of Law
Washington, DC
202-319-5202

Edward McGlynn Gaffney, Jr. *
Valparaiso University
School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7860

* *Counsel of Record*

Victor Gregory Rosenblum
Northwestern University
School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

Other amici curiae listed inside

3888

Amici Curiae Listed Alphabetically

Individuals

David Atwood, Donald Bauer, Daniel Berrigan, Philip Berrigan, Wendell Berry, Abe Bonowitz, Roy Bourgeois, Bernard Broussard, Will Davis Campbell, Janet Chisholm, Carol Crossed, John Dear, Richard Deats, Peter DeMott, Jim and Shelley Douglass, William and Eugenia Durland, Ruth Enero, Mary Anne Flores, Bruce Friedrich, Clare Grady, Ellen Grady, Thomas Gumbleton, Lana Jacobs, Kathy Kelly, Art Laffin, Rachel MacNair, Liz McAlister, Deborah McEvoy, Richard McSorley, Paul Magno, Lillibeth Navarro, Patrick O'Neill, Gail Phares, Mary Rider, Scott and Claire Schaeffer-Duffy, Martin Sheen, Kathy Boylan Shields, Jessica Stewart, John Stoner, Andrew L. Sullivan, Brian Terrell, Howard Zinn, and Stephen Zunes

Associations or Communities

Agape, Casa Juan Diego (Houston, TX), Catholic Peace Fellowship, Center for Action and Contemplation, Center for Peace Studies at Georgetown University, Citizens United for Alternatives to the Death Penalty, Day House (Detroit, MI), Dorothy Day Catholic Worker House, Embrace a Consistent Ethic, Every Church a Peace Church, Feminists for Life of New York, Franciscan Office of Justice, Peace, and the Integrity of Creation, Ithaca NY Catholic Worker, The Los Angeles Catholic Worker, Mary's House (Birmingham, AL), Nevada Desert Experience, Not Dead Yet, The Peter Maurin Center, Pax Christi USA, Plowshares, St. Francis Catholic Worker Community (Columbia, MO), St. Francis and Therese Catholic Worker House (Worcester, MA), Southern Christian Leadership Conference, Vieques Support Committee, Voices in the Wilderness, and Witnesses for Reconciliation.

TABLE OF CONTENTS

Pages

List of Amici Curiae i

Table of Contents iii

Table of Authorities v

Motion for Leave to File Brief of Amici Curiae M1

Brief Amicus Curiae B1

- Statement of Interest of Amici Curiae 1
- Summary of Argument 1
- Reasons for Granting the Writ 2
- Conclusion 15

TABLE OF AUTHORITIES

Pages

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Preamble.....M14

Declaration of Independence, 1 Stat. 1 (1776).....M14

CASES:

Adderley v. Florida, 385 U.S. 39 (1966)..... 10

Bell v. Maryland, 378 U.S. 226 (1964)..... 10

Bouie v. Columbia, 378 U.S. 347 (1964)..... 10

Brown v. Louisiana, 383 U.S. 131 (1966)..... 10

Cox v. Louisiana, 379 U.S. 559 (1965)..... 10

NAACP v. Claiborne Hardware Co.,
458 U.S. 886, 917 (1982)..... 3, 11

National Organization for Women v. Scheidler,
968 F. 2d 612, 620 (7th Cir. 1992)..... 13

National Organization for Women v. Scheidler,
510 U.S. 249, 264 (1994) (Souter, J., concurring,
joined by Kennedy, J.)..... 3

New York Times v. Sullivan, 376 U.S. 264 (1964).. 1, 14, 15

Religious Technology Ctr. v. *Wollersheim*,
796 F.2d 1076 (9th Cir. 1986),
cert. den., 479 U.S. 1103 (1987)..... 2

Texas v. Johnson, 491 U.S. 397 (1989)..... 8

United States v. Anthony,
24 F. Cas. 829 (C.C.N.D.N.Y. 1873)..... 12

United States v. *Enmons*, 410 U.S. 396, 400 (1973)..... 3

United States v. *Nedley*,
255 F.2d 350, (3d Cir. 1958)..... 3

United States v. *Panaro*, 266 F.3d 939 (2001) 3

United States v. O'Brien, 391 U.S. 367 (1968) 8

STATUTES:

18 U.S.C. § 1951(b)(2) 2-3, 5
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) 1-3, 5, 7, 11, 14, 15
Rule 37.6 of the Rules of the Supreme Court 1
Civil Rights Act of 1964 14
Voting Rights Act of 1965. 14

OTHER AUTHORITIES:

Craig Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 SUPREME COURT REVIEW 129 7
Taylor Branch, *Parting the Waters* (1988) 9
Stephen Campbell, *The Slave Catchers* 149 (1968). 9
Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* (1985) ... 13
Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971) 4
Edward McGlynn Gaffney, *Politics Without Brackets on Religious Convictions*, 64 TULANE L. REV. 1143 (1990) 9
Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Temperance Movement* (2d ed. 1986) 13
Linda K. Kerner, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998). ... 11
Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991) 14
Alma Luz, "Susan Brownell Anthony," in 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (Edward James ed. 1971) 12
Edward Madden, *Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy* (1968). 4
Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 26 VALPARAISO U. L. REV. 21 (1991) 7

Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999). 7
Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (1975).. 8
William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992). 12
Louis Ruchames, ed., *The Abolitionists: A Collection of Their Writings* (1963). 8, 9
Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916 (1987) 9
Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime* (1972). 13
David Weber, ed., *Civil Disobedience in America: A Documentary History* (1978). 4, 13
C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974). 9
Howard Zinn, *A People's History of the United States* (1999). 4

Motion of Seamless Garment Network, Sojourners, Southern Christian Leadership Conference, et al., for Leave to File Brief Amicus Curiae

This motion is filed pursuant to Rule 37.2(b) of the Rules of this Court. Counsel of Record for the Petitioners in Nos. 01-1118 and 01-1119 have consented to the filing of this brief. Their consent letters have been lodged with the Clerk of the Court. This motion is necessitated because Counsel for the Respondents in Nos. 01-1118 and 01-1119 has withheld consent.

Amici[1] are individuals and voluntary associations committed to principles of social justice on a wide range of issues of public importance. Participation of an organization in the filing of this brief does not imply that that organization agrees with the substantive views of the petitioners about abortion. Some of the organizations support the views of the petitioners; other organizations have views opposed to those of the petitioners; and still others have no official view on this issue. But all of the amici, whether individuals or communities, join this brief because the novel view of extortion expressed by the court of appeals exposes them to liability under the Racketeer-Influenced and Corrupt Organizations [RICO] act in a manner that they deem clearly at odds with the history of civil disobedience in this country and to the core principle of the First Amendment: the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 264, 270 (1964).

The Southern Christian Leadership Conference [SCLC], the premier civil rights organization of the 1950s and 1960s founded by Dr. Martin Luther King, Jr., filed a

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, Amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

motion in the court of appeals for leave to file a brief amicus curiae in support of the petitioners (appellants). The court of appeals denied this motion, rejecting this brief as "duplicative." The participation of the SCLC in the filing of the attached brief in this Court underscores a broad commitment by all of the amici signing this brief. In all instances when amici engage in protest of the sort described above, they do so with respect for the principle of "nonviolent direct action" made famous by Mahandas Gandhi, Dr. King, César Chavez, and others. Several individual amici, whether acting alone or in concert with others, have frequently engaged in demonstrations voicing their concerns about policies they deem to be inconsistent with their conscientious duty to protect human life.

The lead amicus, *Seamless Garment Network*, is listed first because it helped to coordinate the agreements of all of the other individuals and associations that are signatories to this brief.

Seamless Garment Network [SGN] is a coalition of groups and individuals committed to nonviolence and respect for life. The network promotes the consistent life ethic, focusing on the connections between life issues including war, abortion, poverty, racism, the arms race, the death penalty and euthanasia. SGN supports all means of nonviolent change including, but not limited to, nonviolent direct action, political and legislative action and direct service to those suffering under these attacks on life. *Carol Crossed* (the former executive director of SGN), *Mary S. Rider* (the current executive director), and *Ruth Enero* (president of the Board of Directors) have frequently engaged in nonviolent civil disobedience relating to the issues listed above. All three are married women and mothers of several children. If their political opponents were to use civil RICO against them, the loss of their homes, cars, and other valuable things they own would wreak havoc upon them and their families. Ms. Rider offered a declaration before the district court at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN].

This declaration challenged the enormous breadth of the nationwide injunction.

Individuals

David Atwood is the director of the Texas Coalition to Abolish the Death Penalty Pax Christi of Texas. This group regularly organizes demonstrations against the death penalty in Texas.

Donald Bauer is a Catholic priest who served as a member of the New York State Labor and Religion Coalition since its inception, and who worked tirelessly for farmworker wage equity and other issues on behalf of the poor. He also was appointed to the Congress on Racial Equality and in both of these capacities used public witness to educate and challenge the public.

Wendell Berry is an author, farmer, English professor, and poet. As a long-time conservationist and small farm advocate, he has written many books deploring the loss of family farms and rural jobs to farm factories. He is the recipient of many awards, including the Lyndhurst Foundation Prize and the Jean Stein Award from the American Academy of Arts and Letters.

Abe Bonowitz is the director of *Citizens United for Alternatives to the Death Penalty* [CUADP], a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism.

Roy Bourgeois, M.M., is a Maryknoll priest who, after years as a foreign missionary in Central America, founded the School of the Americas Watch [SOAW], a loose coalition of citizens concerned about the widespread abuse of human rights – including torture and murder of religious leaders and labor leaders throughout Central and South America – by foreign military officers who study at the U.S. Army School of the Americas at Ft. Benning, GA. Each November – on the anniversary of the assassination of seven Jesuit priests and their domestic workers in San Salvador by graduates of the School of the Americas – SOAW

organizes a major demonstration at Ft. Benning against the negative effects of this program upon peace and justice in our hemisphere.

Bernard Broussard is the founder of the *Human Relations Council of Louisiana*, a group that played a leading role in community organization on behalf of the civil rights of African Americans in Louisiana in the mid 1960s. From that time to the present, he continues to challenge through marches, demonstrations, holding prayer meetings on behalf of the oppressed in the South. He is a founder of *Starthrowers*, a human rights organization based in Louisiana.

Will Davis Campbell is a writer, lecturer, and long time supporter of the Civil Rights Movement who helped escort African-American children when they tried to integrate a Little Rock, Arkansas high school back in 1957. A founding member of Dr. King's Southern Christian Leadership Conference, he became the Executive Director of the Committee for Southern Churchmen, which is now known as Witnesses for Reconciliation.

Janet Chisholm and *Richard Deats* are the co-executive directors of the Fellowship of Reconciliation [FOR], the largest, oldest interfaith peace organization in the United States. Since 1915 FOR has carried on programs and educational projects concerned with domestic and international peace and justice, nonviolent alternatives to conflict, and the rights of conscience. FOR promotes nonviolence and has members from many religious and ethnic traditions. It is a part of the International Fellowship of Reconciliation, which has affiliates in over 40 countries. FOR was instrumental, maybe critical, in bringing the Gandhian theory of nonviolent activism into play during the Civil Rights Revolution.

Jim and Shelley Douglass are co-founders of Mary House, Catholic Workers, in Birmingham, Alabama, peace activists, co-founders of Ground Zero Center for Nonviolent Action, and co-organizers of a national campaign to stop the "White Trains" transporting nuclear weapons across the U.S. and to stop the Trident nuclear submarine and missile system. The Douglasses believe that every nonviolent

movement in U.S. history could have been squelched by the way in which RICO has been applied in *NOW v. Scheidler*. The adverse rulings in this case threaten to oppress and deter the organizers of future nonviolent campaigns, now unknown, that may someday prove necessary to the very existence of our country and of life on earth. The Douglasses express the hope that the Supreme Court recognizes that to bolster any one party's mental security in a controversy by destroying an opponent's right to dissent can undermine the most basic human freedoms secured by the Constitution.

William and Eugenia Durland are the founders of the Center on Law and Conscience. Their interest in this case is expressed in the form of a question: "Was Martin Luther King, Jr., a racketeer and extortionist?" They also state: "In the wake of September 11, our constitutional protections are being eradicated in the name of a security state. RICO should not be applied to the exercise of conscientious nonviolence."

Mary Anne Flores, *Clare Grady*, and *Jessica Stewart* are members of the Ithaca Peace Community, a group that expresses concern about social justice issues and facilitates the representation of those who would otherwise remain voiceless and unheard in our society. These three women have engaged in nonviolent direct action that has led to their arrest for trespass upon government property. For example, they have served sentences for trespass at the Hancock Airfield in Syracuse, NY, in order to protest the ongoing bombing of the people of Iraq.

Thomas Gumbleton is a Catholic bishop in the Archdiocese of Detroit, Michigan, and a founder of Pax Christi, USA. He was a leading voice urging the United States Conference of Catholic Bishops to issue its statement in 1971 collectively opposing the Vietnam War on the ground that the war could be longer be justified on the principles of the just war tradition. Bishop Gumbleton has worked and visited in poor and war-torn countries in Latin America and the Caribbean and is deeply concerned with human rights violations around the world. He holds a deep belief in the power of nonviolence to effect social change.

Kathy Kelly is a co-founder of Voices in the Wilderness, a campaign or movement opposing the economic sanctions imposed upon Iraq. The American Friends Service Committee nominated her last year for the Nobel Peace Prize.

Lana Jacobs received the Martin Luther King Award from Companions of Shalom for her work with the inner-city in Columbia, MO, where she lives in community with the poor. Ms. Jacobs has been arrested numerous times for nonviolent direct actions defending the homeless and hungry. Each month she engages in some form of public protest against military build-up, which in her view robs the poor of what they rightfully deserve.

Deborah McEvoy, is a member of *Feminists for Life of America* and of the Detroit Peace Community. In her role as a health professional, she supports the needs of women and their children through petitions, public advocacy and demonstrations.

Rachel MacNair, a Quaker, is the founder and director of *the Feminism and Nonviolence Studies Association*. She has been arrested frequently for participation in nonviolent direct actions at nuclear weapons facilities and abortion clinics.

Lillibeth Navarro is a wheelchair-bound disabilities rights leader and activist in Los Angeles, where she works with *Communities Actively Living Independent and Free* (CALIF). Being in a public and visible role bringing their message of independence on the street is critical to the disabled, whose access to other venues is often stifled.

Gail Phares is a founder of *Witness for Peace* [WFP] a national organization working to affect U.S. policy in Latin America. Ms. Phares is also the founder and director of the Carolina Interfaith Task Force on Central America. She has led many delegations to war-torn areas in Latin America and frequently joins nonviolent peace and justice actions at home. The members of WFP believe that organizing for justice –including the right to nonviolent protest of official policies of our government – is a fundamental right secured

under the Constitution.

Scott and Claire Schaeffer-Duffy are co-founders of the Saints Francis and Therese Catholic Worker in Worcester, MA, a lay Catholic pacifist community which offers hospitality to homeless men and women. They also publish the *Catholic Radical*, a bi-monthly journal of opinion. Scott, who has engaged in civil disobedience at weapons facilities and abortion clinics, has lectured extensively on the value of nonviolent direct action at colleges and universities throughout New England. The Schaeffer-Duffy's state their interest in this case as follows: "Nonviolent civil disobedience is an American tradition, one that has brought much good to our country. We advocate its use when laws contradict the needs of the common good and the greater law of God's love for all." The Saints. Francis and Therese Catholic Worker is a member of the Seamless Garment Network.

Martin Sheen is an actor who has participated for nearly two decades in protests against weapons of mass destruction and in demonstrations pertaining to homelessness and other issues of social justice.

John Stoner is a member of Mennonite Central Committee, a traditional peace church. He is the founder of *Every Church a Peace Church*, a movement to share the convictions of the Anabaptist community with all other Christian churches.

Andrew L. Sullivan served as the Chair of the Libertarian Party of Nebraska from 1999 to 2001. His interest in this case is that law must hold the greatest punishment for violent acts and must distinguish between violent and nonviolent acts. The misapplication of RICO to nonviolent civil protest levels out the distinction between violence and nonviolence creating a waterfall turn from dissent to violent action. Without nonviolent action, people will passively accept government oppression no matter how severe, or be propelled directly into violent action, for the penalty for actions of nonviolence would become essentially the same as violent actions.

Brian Terrell is a leader of the Catholic Peace Ministry

in Des Moines, Iowa and is a participant with members of the Des Moines Catholic Worker community in nonviolent Gandhian activism at Offut Airforce Base.

Howard Zinn is a Professor of History at Boston University. He has served as a professor of history at Spelman College in Atlanta, and as a visiting professor at the University of Paris and the University of Bologna. He has written over a dozen books which deal in some way with protest movements in American history. Two of these books most closely related to the theme of this brief are *Disobedience and Democracy* (1968), and *A People's History of the United States* (1999).

Stephen Zunes is a Professor of Political Science at the University of San Francisco. He is the principal editor of *Nonviolent Social Movements* (Blackwell, 1999). His research interests have included the impact of grassroots political movements on policy and government. Prior to his academic career, he engaged in nonviolent civil disobedience campaigns against nuclear power, nuclear weapons and apartheid and served as a staff member and nonviolence trainer for organizations supporting nonviolent civil disobedience.

Communities and Voluntary Associations

Agape is a community of faith in Franklin, LA, that witnesses for peace and justice through nonviolence. It engages in education of its members and the public, especially on the death penalty, through publishing booklets, brochures, and treatises on how to effect change through raising public awareness and consciousness about issues of justice and peace.

Catholic Peace Fellowship [CPF] is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in nonviolent civil disobedi-

ence of laws and policies inimical to peace in today's world.

Center for Action and Contemplation is a Christian Center forwarding the integration of social action and contemplative prayer. We actively engage in transforming society around the issues of poverty, war, and other kinds of violence.

Center for Peace Studies at Georgetown University engages in education about historical figures, like Dr. Martin Luther King, Jr, Mohandas Gandhi, Thomas Merton and their message of how to achieve peace through "creative tension," "disturbing a negative peace," and "consciousness raising." The founder, *Richard McSorley*, S.J., has been a leader in these educational endeavors for over two decades. He regularly organizes students and others to appear publicly at the Pentagon, the White House, and other federal institutions in and around Washington DC, to protest policies that deprive the poor of justice.

Citizens United for Alternatives to the Death Penalty [CUADP] is a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. Like the demonstrators in the *Scheidler* case, CUADP is deeply committed to the principles and practice of nonviolence as espoused by Mohandas Gandhi, Martin Luther King, Jr., César Chavez, and others. For this reason CUADP is concerned that activists who engage in nonviolent civil resistance might be lumped with mobsters and terrorists simply for planning their activities in advance. Good planning is essential to ensuring that no property or person is hurt in the process of expressing concern or outrage at injustice.

Dorothy Day Catholic Worker House [DDCW] in Washington, D.C. is a community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the

root causes of homelessness. Committed to following the teachings of Christ on nonviolence, the community sponsors a weekly vigil for peace at the Pentagon as well as numerous other demonstrations against war and militarism, poverty and abortion. Other communities in the Catholic Worker network signing this brief include: St. Francis Catholic Worker Community (Columbia, MO); St. Francis and Therese Catholic Worker House (Worcester, MA); Mary's House (Birmingham, AL); The Los Angeles Catholic Worker; Ithaca NY Catholic Worker; Day House (Detroit, MI); and the Casa Juan Diego (Houston, TX).

Embrace a Consistent Ethic participates in ongoing peaceful public witness against all forms of taking human life, including opposition to war, capital punishment, euthanasia, abortion, racism & poverty. The *NOW vs Schiedler* case interferes with the ability to carry out group/individual conscientious objection, even those actions which would normally be considered within the limits of free speech.

Every Church a Peace Church [ECAPC] is an association of churches that adopt nonviolent struggle as their way to pursue justice. For this reason ECAPC agrees with the brief filed in this case by the Southern Christian Leadership Conference in the court of appeals that the power to impose treble damage awards upon the petitioners and to enter a nationwide injunction under RICO represents "clear and present danger to future prospects for the lawful exercise of our liberties, namely, the free exercise of religion, speech, press, or assembly and petition for redress of grievances." ECPC will be neither embarrassed nor deterred if we discover one day that our church members are filling the courts, and even the jails, for the free exercise of their religion in face of this regressive judicial ruling.

Feminists for Life of New York is a pro-woman, pro-life organization that advocates for change for women and their children. Some of its members engage in civil disobedience. In the twelve years since its existence across the New York, it has worn costumes of the early suffragists and stationed themselves outside of convention centers, libraries, and marched wearing the white garb of our founding

mothers on issues such as domestic violence, child abuse, and child welfare rights. Like Susan B Anthony, they have worn gags on our mouths to protest the silencing of our voices. They participate in a vigil at the Hall of Justice on every second Friday of the month to protest the death penalty.

Franciscan Office of Justice, Peace, and the Integrity of Creation, Santa Barbara Province, practice outreach, advocacy, and education with and on behalf of the friars and those with whom they minister

Nevada Desert Experience has since 1983 organized nonviolent civil disobedience at the U.S. nuclear test site in Mercury, NV, where tens of thousands of people – including the famous actor Martin Sheen – have been arrested for trespass in their public protest against weapons of mass destruction.

Not Dead Yet is a national grassroots organization of people with disabilities formed to oppose legalization of assisted suicide and euthanasia, and to bring a disability-rights perspective to the legal and sociological debate around euthanasia and physician assisted suicide. Formed in 1996 in Illinois, Not Dead Yet has worked to educate, support, coordinate and lead the disability community's effort to stop the "right to die" from becoming a duty to die or a right to kill. Not Dead Yet's amicus brief, filed in the U.S. Supreme Court in the case of *Vacco v. Quill,* 117 S.Ct. 2293 (1997), was among a handful, out of over 60 such briefs, cited by the Court in its final opinion. Not Dead Yet has given invited testimony before U.S. Congressional committees three times. Members have also engaged in non-violent direct action, such as a rally outside the U.S. Supreme Court in January, 1997, and in civil disobedience for which members, most of whom use wheelchairs, have been arrested on misdemeanor charges, such as trespass for a sit-in at the corporate headquarters of the Hemlock Society, and disturbing the peace for protest actions at a conference of the World Federation of Right To Die Societies.

The Peter Maurin Center in Washington, D.C. was established in 1997. In the words of Peter Maurin, the center

seeks to contribute to creating a "society where it is easier to be good." The Center does so in three ways: (1) evangelization in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distribute it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and specifically to rid themselves of the Navy at Vieques; and through work for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal. The Center is concerned with the broad and elastic application of the RICO act to dissent and nonviolent protest. The misapplication of the law in this way permits the government to single out and criminalize movements for social change virtually at will. Affording the government power of this nature renders democratic practices timid and superficial and essentially disempowers the People in the political process. To protect popular, and especially unpopular, political expression, these effects of the RICO law need to be nullified.

Pax Christi USA is the national Catholic peace movement of 14,000 members who are committed to the gospel imperative of seeking peace through nonviolence. The members of this association promote peace through personal; and social transformation. They frequently engage in nonviolent protest of policies that undermine peace and justice.

Plowshares is a coalition of religious believers who seek to enflesh the words of the prophet Isaiah 2:4, "They shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not take up sword against nation and neither shall they study war anymore." The founders of this movement, Fr. Daniel Berrigan, S.J., his brother, Philip Berrigan, and Philip's wife, Elizabeth McAlister, were leaders in the opposition to the Vietnam War. From burning draft files to organizing larger civil disobedience actions, they provided the peace movement with a keen focus. Their actions against militarism and the nuclear

arms race continue today. Fr. Berrigan offered a declaration before the district court at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN]. This declaration addresses the severe impact on nonviolent social protest that flows from treating loose associations of antiwar protesters as though they were racketeer-influenced corrupt organizations. The Berrigan brothers and Ms. McAlister join this brief in their individual capacities, as do the following Plowshares Activists: John Dear, S.J., Peter DeMott, Bruce Friedrich, Ellen Grady, Art Laffin, Paul Magno, Patrick O'Neill, and Kathy Boylan Shields. Fr. Dear's writings focus on nonviolence and peacemaking. His book, *Peacemaking Behind Bars*, is an account of his time spent in jail for a 1993 action at Seymour Johnson Air Force Base in Goldsboro, N.C. He has participated in many other actions of nonviolent civil disobedience for justice and peace. All of these activists have spent many years imprisoned for their nonviolent protest against war.

Sojourners is a Christian ministry whose mission is to proclaim and practice the biblical call to integrate spiritual renewal and social justice. In response to this call, the members of this community offer a vision for faith in public life by: publishing *Sojourners* magazine, and other resources that address issues of faith, politics, and culture from a biblical perspective; preaching, teaching, organizing, and public witness; nurturing community by people from the various traditions and streams of the church; supporting the work of the Sojourners Neighborhood Center in Washington, D.C.; hosting an annual program of voluntary service for education, ministry, and discipleship. Members of Sojourners seek to be guided in their lives and work by the biblical principles of justice, mercy, and humility.

Southern Christian Leadership Conference [SCLC] is a nonprofit, non-sectarian, inter-faith advocacy movement of people and for people, growing out of the deep tradition and long history of struggle for basic human rights. This movement, grounded in the philosophy of nonviolent resistance, has roots in the larger history of liberation struggles by

black people and all oppressed people the world over. SCLC holds that authentic love demands movement against injustice as a moral imperative.

Vieques Support Committee is an organization that has helped to organize civil disobedience to protest the repeated bombing of Vieques Island in Puerto Rico by the United States Navy.

Voices in the Wilderness is a group that seeks to end the economic sanctions against the people of Iraq. The group sends delegations to Iraq to break the siege and bring desperately needed medical supplies to children and families. It has also sponsored demonstrations against the ongoing sanctions, including week-long fast outside the headquarters of the United Nations in New York.

Witnesses for Reconciliation was formerly the Committee of Southern Churchmen that was founded in the 1960 to promote the work and vision of Dr. Martin Luther King, Jr., and to advance his cause of nonviolence. They promoted, participated in, and led marches, sit-ins, boycotts, and the freedom rides. Today they are small but continue to advance the cause of civil and political rights for minorities.

If uncorrected by this Court, the unwarranted expansion of the federal racketeering law by the court of appeals will repress the function of popular protest in the American constitutional order. At the very center of American constitutionalism is the commitment to truths our founders acknowledged as self-evident: that all men and women are created equal, that they are endowed by their Creator with certain inalienable rights (including life, liberty, and the pursuit of happiness) and that governments instituted to secure these rights derive their just powers from the consent of the governed. Declaration of Independence, 1 Stat. 1 (1776); Declaration of Sentiments of the Seneca Falls Convention (1848). It is "We, the People" who ordain and establish the Constitution for the United States, who ratify it in popular conventions, and who amend it over time to provide for a more perfect Union. U.S. Const., Preamble.

The government has from time to time and in various

ways violated these foundational truths. In such times, the People have often been the moral compass, disagreeing with existing policies and calling the nation forward to a deeper understanding of the fundamental truths at the heart of the American experiment, such as the right to life and the right to liberty. The law, in short, has not only been an instrument of establishing justice, but has also become a means of coerced injustice. At each of the critical turning points in our nation's history, the People have protested the moral flaws of the law, whether enacted by the people's representatives or pronounced by the judiciary.

Popular resistance to law is not justified merely because a lot of people engage in it. Lynch mobs were the classic example of violent popular power that is repugnant to our Constitutional order. But nothing analogous to that sort of violence is attributable to any of the petitioners in this case. The Court should review the decision of the court of appeals to secure one of the noblest features of American democracy, the right of the People to engage in non-violent protest against governmental violence and against violations of fundamental liberties, including the inalienable right to life itself.

For the reasons offered above, amici urge the Court to grant this Motion for leave to file the attached brief amicus curiae.

Respectfully submitted,

Edward McGlynn Gaffney, Jr. *
Valparaiso Univ. School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7860
Counsel of Record

Robert A. Destro
Catholic University of America

Columbus School of Law
Washington, DC 20064
202-319-5140

Victor Gregory Rosenblum
Northwestern University School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

Counsel for Amici Curiae

Brief Amicus Curiae of Seamless Garment Network, Sojourners, Southern Christian Leadership Conference, et al., in Support of Granting the Petition

Statement of Interest of Amici Curiae

Amici[1] are voluntary associations committed to principles of nonviolent direct action on a wide range of social issues. Inclusion of an organization on this list does not imply that that organization agrees with the substantive views of the petitioners about abortion. Some of the organizations have no official view on that matter; others have views opposed to those of the petitioners. But all of the amici, whether individuals or communities, join this brief because the novel view of extortion expressed by the court of appeals exposes them to liability under RICO in a manner that they deem clearly at odds with the history of civil disobedience in this country and to the core principle of the First Amendment: the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 264, 270 (1964).

The particular interests of the amici curiae are stated in the Motion for Leave to File this brief amicus curiae.

Summary of Argument

If the novel theory of extortion adopted by the court of appeals were the law of the land at any earlier period of our history, it would have been a major impediment to all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation. In particular

[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

the movements to abolish slavery, to end racial discrimination, to include women within the franchise and the full obligations of citizenship, and to end irrational gender discrimination would have been set back severely. This reading of our history cautions against the expansion of civil RICO to nonviolent protesters who occasionally employ the tactic of civil disobedience to manifest their protest to the current status of the law.

Reasons for Granting the Petition

1. As an initial matter, amici note that the first and second questions presented in No. 01-1118 address clear and serious conflicts among the circuits that merit the full attention of this Court.

A. As to the first question – whether injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) – the court of appeals openly acknowledged that it was departing from the negative answer previously given to this question by the United States Court of Appeals for the Ninth Circuit in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). See No. 01-1118, Pet. App. 6a-14a. The effect of this ruling was to affirm an injunction that should give one pause because of its stunning breadth (nationwide) and its extended duration (twelve years). This injunction should trigger alarm bells about the direct involvement of the federal judiciary in one of the most intense political controversies in the nation. Congress has never said that RICO was intended to become an instrument of judicial management of intense political debate. We urge the Court to grant the petition to address the first question, because the injunction sustained by the court of appeals is an unprecedented expansion of RICO unauthorized by the statute.

B. The second question presented is as follows: "Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce 'by robbery or

extortion' – and which defines 'extortion' as 'the *obtaining* of *property* from another, with [the owner's] consent,' where such consent is 'induced by the wrongful use of actual or threatened force, violence, or fear' (18 U.S.C. § 1951(b)(2) (emphasis added)) – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there." The novel view of extortion advanced by the court of appeals, Pet. App. 28a-29a, is in clear and serious conflict with the decisions of other circuits, see, e.g., *United States* v. *Panaro*, 266 F.3d 938 (2001), and *United States* v. *Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958). The decision of the court of appeals in this case also represents a departure from this Court's teaching in *United States* v. *Enmons*, 410 U.S. 396, 400 (1973) (reversing Hobbs Act convictions of labor union officials and members who had engaged in acts of physical violence and destruction of property during a campaign to induce an employer to agree to a union contract, because they had acted to further "legitimate union objectives, such as higher wages in return for genuine services").

C. The third question presented is whether the exacting standards for the protection of First Amendment rights mandated by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) were satisfied in the district court, where the jurors were allowed to hear evidence of episodes completely unrelated to the petitioners. The court of appeals held that *Claiborne Hardware* was fully complied with, No. 01-1118, Pet. App. 14a-22a. Amici are of the view that the court of appeals paid mere lip service to the caution of two of the Justices in this case: "Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis." *National Organization for Women v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring, joined by Kennedy, J.) (citing *Claiborne Hardware*) The Court should also grant the petition to re-

view this question.

2. In this brief Amici focus on the second question. We address one point: if the novel theory of extortion adopted by the court of appeals were the law of the land at any earlier period of our history, it would have been a major impediment to all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation.

Any serious student of American history is aware that the struggle to secure these fundamental freedoms has been deeply conflictual. *See, e.g.*, Howard Zinn, *A People's History of the United States* (1999). This theme of conflict over basic values recurs in every generation from the founding moment to the present, from the Boston Tea Party through antiwar protests (notably during the Mexican-American War, the Civil War, World War I, World War II, and the Vietnam War, and in response to the ongoing presence of weapons of mass destruction), to the most recent demonstrations against the New Economic Forum and the global order that it represents. Thus the controversy over abortion is by no means the first volatile issue in the nation.

America is a nation with both a strong respect for the civilizing force of law and a healthy regard for the moral limits on law itself acknowledged in the tradition of civil disobedience, including episodes of confrontation with authority, that can be found in virtually every period of American history. *See, e.g.*, David Weber, ed., *Civil Disobedience in America: A Documentary History* 185-88 (1978); Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971); and Edward Madden, *Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy* (1968). If the Court grants the petition, Amici will brief this point more fully, offering the Court several illustrations of why the view of extortion adopted by the court of appeals is fundamentally at odds with the history of our nation. At this stage of the proceedings, we think it enough to focus the discussion on two aspects of our constitutional history: racial equality and gender equality. Before treating these two central themes, we clarify our reading of

what the court of appeals did to the law of extortion.

A. The court of appeals sustained the imposition of massive civil damages upon the three named individual petitioners under the federal racketeering statute. The legal lynchpin of this use of RICO is that the petitioners conducted or participated in the conduct of the affairs of the Pro-Life Action Network [PLAN] through a pattern of "predicate acts" of extortion in violation of the Hobbs Act, 18 U.S.C. §1951, and various state extortion statutes.

To reach this result, the court of appeals sustained the district court "in all respects," Pet. App. 31a. The district court allowed the jury to hear the following evidence as probative of "extortion." "Obtaining" property was proved on respondents' showing a temporary delay in keeping an appointment at an abortion clinic (Tr. 5005). The clinics' lost "property" was the money diverted to "extraordinary security costs" (Tr. 572). Respondents did not allege or seek to prove any loss of business *per se*. Demonstrating, being in the way, delaying access, without more, was equated with violence to discourage patients (Tr. 712) from keeping their appointments and force clinics to pay additional security costs (Tr. 607). The court of appeals ruled that any errors that may have occurred in this handling of the evidence were "harmless," Pet. App. 30a, because the court of appeals adopted the respondents' theory that they did not need to demonstrate that the petitioners sought specifically to "obtain property," but that it was enough to demonstrate that the petitioners interfered with the personal rights of the owners of abortion clinics: "Property rights include a woman's right to choose what to do with an unplanned pregnancy. Our most precious rights are the intangible ones like the right to go about our lawful business free from fear. Interfering with those rights by threats and force and violence violates RICO." (Tr. 4987; see also Tr. 550).

As to acts of actual physical violence, the court of appeals sustained the decision of the district court allowing the plaintiffs to bring a dumpload of irrelevant evidence before the jury about the conduct of persons never identified in the trial. Whoever these parties were, their acts against

various abortion providers (Tr. 685, 687, 723, 1148, 1486, 2147-50) over the fourteen years from 1984 to trial were most emphatically not the acts of any of the named petitioners, all of whom are committed exclusively to nonviolent protest, sometimes involving illegal acts such as trespass that are fully punishable under state law. Without a scrap of evidence that any of these three individuals ever committed any act of violence at any time, respondents smeared the petitioners not with a broad stroke, but with a tar brush. For example, since there was no proof that any petitioner was responsible for the murders, arsons, and kidnappings that the respondents introduced into evidence, the district court excluded such evidence from the trial for the purpose of blaming defendants, but gave the respondents free rein to refer to such incidents as "background information" for the purpose of evaluating whether the petitioners were guilty of "extortion" (Tr.685, 723, 1486, 5181).

This is not harmless error. This is the pollution of the wellspring of justice. Presentation of evidence of this kind to a jury cannot be cured with a teaspoon of medicine at the end of the trial asking the jury to ignore what it was allowed to hear as part of the "context" within which they should evaluate the words and speeches of the petitioners, to determine whether these words constituted "threats" of "violence." (Tr. 5187) For example, when a clinic operator was not present, Mr. Scheidler went to the clinic to meet with her, he left his card and wrote on the back of it two words, "Choose Life." Petitioners were not allowed to testify that the phrase was from the Bible[2] and was used to encourage respect for all human life. (Tr.1489) Neither were the petitioners allowed to present counter-contextual evidence in rebuttal. This is the record upon which the court of appeals

[2] The author of the words is Moses; the context of his well-known sermon to the people of Israel is as follows: "I call heaven and earth to witness against you today that I have set before you life and death, blessings and curses. Choose life so that you and your descendants may live, loving the LORD your God, obeying him, and holding fast to him; for that means life to you and length of days, so that you may live in the land that the LORD swore to give to your ancestors, to Abraham, to Isaac, and to Jacob." (Deuteronomy 30:18-20).

fashioned its novel claim that proof of extortion under the Hobbs Act does not require a showing of "obtaining property" in any sense remotely like what the common law of extortion has traditionally meant. *See* Craig Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 SUPREME COURT REVIEW 129; Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

B. If the view of the court of appeals described above had been the law of the land during the period of American slavery and Jim Crow, the overcoming of those twin evils would have been postponed for much longer than the time actually needed to do so.

As Justice Marshall reminded us during the Bicentennial of our Constitution, not everything about this country's past – including slavery and Jim Crow segregation – is cause for rejoicing. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 26 VALPARAISO U. L. REV. 21 (1991).

In recent times we frequently compared ourselves favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We take some pride in the way we have respected the strong voice of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been a lot easier to recognize the value of social protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

Nearly everyone in America would now regard the eradication of the slavery system as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier

and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the rigid mindset of the slaveholders who would brook no compromise on the matter of slavery as an "inalienable property right" bound up in their minds with an intractable position on state sovereignty.

Whatever the possible outcome of alternative hypothetical scenarios, the Abolitionists pressed groundbreaking ideas. The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and publicly asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity, injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD" (emphasis in original), as cited in Louis Ruchames, ed., *The Abolitionists: A Collection of Their Writings* 31 (1963).

The American Anti-Slavery Society, of which Garrison was President from 1843 to 1865, regularly burned a copy of the Constitution at its annual meeting in Boston, denouncing that document – because of its flawed compromise on slavery – as "a covenant with death, a compact with hell" (citing *Isaiah* 28:15); *see* Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (1975). Under modern precedents that sort of activity would probably be deemed protected. *See Texas v. Johnson*, 491 U.S. 397 (1989) (burning of American flag protected); *but see United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card not protected). Under the law as it then stood, these acts were not protected under the First Amendment. But at least no one imagined that the protest activity of the Abolitionists fell within the law of extortion.

Similarly unprotected conduct included the unlawful operation of the "Underground Railroad" to assist slaves to

flee from their masters, *see* Edward McGlynn Gaffney, *Politics Without Brackets on Religious Convictions*, 64 TULANE L. REV. 1143, 1160 (1990), and the "rescuing" of slaves from the very courtrooms where their extradition hearings under the Fugitive Slave Act were being held, *see* Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916, 1919 (1987), and Stephen Campbell, *The Slave Catchers* 149 (1968). The Abolitionists suffered violence for their views not only at the hands of private parties, but also at the hands of the government.

Less famous Abolitionists may have been more effective in moving the hearts of their countrymen, but Garrison and the Abolitionists were ultimately heard. As Garrison accurately predicted in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT" (emphasis in original), as cited in Ruchames, ed., *The Abolitionists, supra* at 31. Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law.

Decades after the failure of the problematic period of "Reconstruction," we are now more committed than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" and their moral progenitors, the Abolitionists.

The Jim Crow system was as iniquitous at its core as it was violent in the pattern of enforcement by the government at the state and local levels. *See, e.g.*, C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974). In the face of such systemic violence imbedded in the law, the Civil Rights Movement was remarkable precisely for the commitment of its leaders, principally Dr. Martin Luther King, Jr., to Gandhian nonviolence. But as Dr. King made clear in his famous Letter from Birmingham Jail, nonviolence did not mean obeying unjust laws. On the contrary, King and his followers in the Southern Christian Leadership Conference frequently challenged the brutality of the existing legal order. *See, e.g.*, Taylor Branch, *Parting the Waters* (1988) (use of tactics of civil disobedience similar to those

used by the petitioners in this case).

Amici note that – as in the period of abolitionism – the violence surrounding civil disobedience in the era of the Civil Rights Movement was committed primarily not by the protesters, but against them by their adversaries or by the police. Bull Connor undoubtedly thought he was preserving the peace against lawless agitators in Birmingham, but most of America saw the violence in the bared teeth of his dogs.

Memorable uses of civil disobedience in the era of the modern Civil Rights Movement included the efforts of the freedom riders and of the people who "sat in" places of public accommodation that were segregated on the basis of race. In some cases this Court overturned convictions for breach of the peace or for trespass under state law, perhaps for the reason that the Court could no longer countenance the underlying state legislation requiring Jim Crow segregation, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966).[3] In other instances the Court declined to reverse criminal convictions of protestors under state law, pointing to other dimensions of the facts, such as the integrity of the state courthouse or a State jailhouse. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). No matter which way these cases turned, the inescapable fact is that civil rights activists engaged in acts of civil disobedience that would have been seriously impeded if the novel view of "extortion" adopted by the court of appeals had been the law of the land at that time.

The nation is now better off because of the movements to abolish slavery and to end Jim Crow law. Both of these movements faced steep opposition from those who wished to maintain the status quo. The opponents of these movements could easily have crushed the protesters if the theory of extortion adopted by the court of appeals had been available to them during these conflicted periods of American

[3] In a series of "sit-in" cases brought before the enactment of Title II of the Civil Rights Act of 1964, the Court declined to hold expressly that the Jim Crow laws were themselves unconstitutional, but found an alternative ground on which to reverse the State law conviction. *See, e.g., Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964).

history.

The district court acknowledged the relevance of this period of history to this case, which he agreed was "analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience." Pet. App. 73a, see also Tr. 4339-40. But Judge Coar curiously concluded that the analogy with the sit-ins and the refusal to move to the back of the bus "works in [respondents'] favor" because those protesters were "arrested, jailed, and otherwise punished." Pet. App 73a. No one would seriously maintain that Martin Luther King, Jr., or his colleagues in the SCLC, were the sort of "racketeer" that Congress had in mind when it enacted RICO. The district court was understandably perplexed by the implication that some of his own rulings would have thrown an enormous obstacle in the path of the Civil Rights Movement. But it did not lead him to instruct the jury in the manner required by *Claiborne Hardware*. Though briefed on these matters, the court of appeals completely ignored this history in its discussion of the case.

C. If the view of the court of appeals had been the law of the land during the period of feminist insistence upon full participation in the rights and obligations of citizenship, equal justice under law for women and men would have taken much longer than the two centuries it took to achieve.

Many scholars have noted strong parallels between the slavery system and the abusive treatment of women as "chattels personal" subject to the law of coverture enacted by all-male legislatures and enforced by all-male courts. Women wanted to participate in the franchise and in all of the obligations of citizenship from the very outset of the republic. They were excluded from doing so on the basis of the theory of virtual representation, the very theory that the revolutionaries used to reject the imperial rule of Great Britain over the American colonies. *See, e.g.,* Linda K. Kerner, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 3-33 (1998).

As with the struggle to abolish slavery and then to eradicate the legal structure of apartheid, the effort to change the inequality between men and women under the

law of this land was a prolonged and intense controversy. The feminists of the nineteenth century may not be contained within rosy-tinted portraits. Susan B. Anthony is now featured on the most valuable of our coins and is rightly remembered as the principal advocate for the enfranchisement of women. She was also an agent of the American Anti-Slavery Society. In this capacity she urged an audience before the Civil War to "overthrow this government, commit its blood-stained Constitution to the flames, blot out every vestige of that guilty bargain of the father." As cited in Alma Luz, "Susan Brownell Anthony," in 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (Edward James ed. 1971).

Eight decades after the adoption of the Nineteenth Amendment we now take for granted that women should be able to vote. But Anthony's advocacy of this view was never easy. For example, Anthony challenged the legitimacy of the all-male franchise by voting in Rochester in 1872 before a constitutional amendment expressly allowed it. She was convicted of voting fraud after a member of this Court, Justice Ward Hunt, disallowed the introduction of exculpatory evidence and directed the jury to enter a verdict of guilt without any opportunity to reflect upon the evidence. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873). Such judicial misconduct is reminiscent of the egregious behavior of Justice Chase presiding over trials under the infamous Sedition Act of 1798. *See* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).

The transcript of Anthony's bold statement before her sentencing makes clear that she was prepared to risk not only violating the law as it then stood, but also to risk being found in contempt of court. Anthony continued to speak powerfully about the injustice of her conviction, even though Justice Hunt demanded that Anthony sit down and be silent, warning her seven times to the effect that "The Court can not allow the prisoner to go on." After she finally sat down, the Court required her to stand up to hear her sentence, and she then told the Court: "May it please your

honor, I shall never pay a dollar of your unjust penalty.... I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that 'Resistance to tyranny is obedience to God.'" David Weber, ed., *Civil Disobedience in America: A Documentary History* 185-88 (1978).

Anthony's views were ultimately vindicated by the enactment of the Thirteenth Amendment abolishing slavery and the Nineteenth Amendment enfranchising women. But the Thirteenth Amendment was ratified in 1865 only after the Civil War, and the Nineteenth Amendment was ratified in 1920 only after several further bold acts of public protest unmasking the "hypocrisy" of President Woodrow Wilson's commitment to wage war for democracy for males in Europe, but not to proceed peacefully within our constitutional processes to secure the franchise for females in America. Like the Abolitionists, the Suffragists suffered violence. Federal troops dispatched by President Wilson broke up a peaceful protest in the nation's capital.

As the court of appeals noted in the first phase of this litigation, women played a leading role in the temperance movement. *National Organization for Women v. Scheidler*, 968 F. 2d 612, 620 (7th Cir. 1992). There is a striking similarity between the acts of the petitioners complained of here and the militant tactics employed by famous nineteenth century feminists who led the temperance movement. For example, Carry Nation and others like her applied constant moral pressure on owners of saloons to discontinue their sale of alcohol, and were willing to disrupt their business by charging into saloons and destroying kegs of whiskey and beer with an ax. *See, e.g.*, Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* 50, 76-77, 197 (1985) (describing violence against protesters); Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Temperance Movement* (2d ed. 1986); Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime* (1972).

The demonstrations and sit-ins occurring during the period while the ratification of the Equal Rights Amendment

was being debated are reminiscent of those during the Civil Rights Movement. The golden rule, or equal justice under law, suggests that the standards applied to the respondents in that period should also apply to the petitioners in the era of contestation over abortion.

The abolitionists and those engaged in the modern Civil Rights Movement sometimes engaged in civil disobedience to help raise the awareness of the nation that the rule of law that countenanced slavery and then apartheid was intolerable. The feminists of the nineteenth century and those engaged in the modern movement for gender equality also engaged in civil disobedience to bear witness to the injustice of rules of law imposed upon women without their consent by all-male legislatures in which they had neither voice nor vote. If the novel view of extortion espoused by the court of appeals – equating trespass with "obtaining property" – had been the law of the land in any of these eras, it would probably have taken much longer to achieve the prohibition of discrimination on the basis of race, color and gender contained in statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

This Court has been especially alert to the fragility of movements protesting against deprivations of liberty and equality. In *New York Times v. Sullivan*, 376 U.S. 264 (1964), the Court protected the assets not only of the country's most powerful newspaper, but also one of the weakest and most vulnerable movements of that era, which would not have survived if its political adversaries had been permitted to use state libel law to impose runaway monetary judgments against it. *See, e.g.*, Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991). The Court should act now with no less solicitude to secure the freedom of expression on controversial matters to all classes of protesters without discrimination on the basis of the content of their speech or the viewpoint they express. The Court should take this case to set sensible limits upon the use of civil RICO that are informed by our nation's history and by the principles of the First Amendment. To do so would reinforce the "profound national commitment to the principle that debate on public issues should be uninhibited,

robust, and wide open." *New York Times v. Sullivan*, 376 U.S. , at 270.

Conclusion

One of the easiest ways to know that the court of appeals is wrong in its reading of the law of extortion is that it is so profoundly out of kilter with this nation's history. This Court should take this case to correct a problem that is bound to wreak a lot of mischief unless the Court withdraws the federal judiciary from heavy-handed and one-sided intervention in contentious political controversies better left to the People and to their elected representatives. If the federal racketeering law is to be expanded far beyond the reach and grab of its original scope, that task should be accomplished by statutory amendment, not by judicial sleight of hand. If RICO is to become an instrument of shackling popular protest in political controversies, let the People's elected representatives in Congress – not the courts – inflict such a wound on the democracy. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Edward McGlynn Gaffney, Jr. *
Valparaiso University School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7860

* *Counsel of Record*

Robert A. Destro
Catholic University of America
Columbus School of Law
Washington, DC 20064
202-319-5140

Victor Gregory Rosenblum

Brief, 16

Northwestern University School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

Supreme Court U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

Nos. 01-1118
01-1119

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC., *Petitioners*,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS JOSEPH SCHEIDLER, et al.

Theresa Schrempp*
SONKIN & SCHREMPP, PLLC
Eightieth Avenue Professional Building
2955 80th Avenue SE
Suite 201
Mercer Island, Washington 98040-2960
(206) 275-2878

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, Washington 98104
(206) 903-1800

Attorneys for Amicus curiae
*Counsel of Record

RPI Legal Printers, Seattle, Washington

228

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S. C. § 1964 (c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect intersection commerce "by robbery or extortion" — and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent in "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U. S. C. § 1951 (b) (2) (emphasis added)) — criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

3. Whether, in this civil RICO action based on the nation-wide conduct of thousands of abortion protesters over a 15 year period, the jury's determination of liability and award of treble damages — and the procedures and instructions used by the trial court to channel the jury's decision making — satisfied the exacting standards for the protection of First Amendment rights mandated by *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 102 S. Ct. 3409 (1982).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSEPH SCHEIDLER, et al. 1

INTEREST OF THE AMICUS 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAIN" PROPERTY. 4

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property. 5

B. Common Law Extortion Required That The Defendant Obtain Property. 6

C. The Legislative History of the Hobbs Act Dictates the Necessity for the Element of "Obtain." 7

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT 10

CONCLUSION 16

TABLE OF AUTHORITIES

Federal Cases

Carey v. Brown, 447 U. S. 455, 467 (1980) 10

Feminist Women's Health Center v. Codispoti, 63 F.3rd 863 (Ninth Cir. 1995) ..... passim

Feminist Women's Health Center v. Roberts, W. D. Wa. 86-161-Z; Docket No. 576 ..... 1, 2, 3, 11

Ianelli v. United States, 420 U. S. 770, 777, n. 10 (1975) 14

Morissette v. United States, 342 U. S. 246 (1952) 7

NAACP v. Button, 371 U. S. 415, 438 (1963) 14

NAACP v. Claiborne Hardware Co., 458 U. S. 886, 102 S. Ct. 3409 (1982) ..... i, 11, 13, 14

Northeast Women's Center v. McMonagle 868 F.2d 1342, (3rd Cir. 1989) *cert. denied* 493 U. S. 901 (1989) 3, 9, 15

Noto v. United States, 367 U. S. 290, 299 (1960) 14

Police Dept. of Chicago v. Mosley, 408 U. S. 92 (1971) 15

Russello v. United States, 464 U. S. 16, 21 (1983) 5

Scales v. United States, 367 U. S. 203, 299-300 (1961) 11

U. S. v. Dotterweich, 320 U. S. 277, 286 (1943) 5

United States v. Bailey, 444 U. S. 394 (1980) 7

United States v. Chestnut, 394 F. Supp. 581, 591 (S.D.N.Y. 1975) 6

United States v. Enmons, 410 U. S. 396 (1973) 10

United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820) 6

State Cases

People v. Ryan, 232 N.Y. 234, 133 N. E. 572, 573 (1921) 8, 9

People v. Squillante, 18 Misc.2d 561, 564, 185 N. Y. S.2d 357, 361 (1959) 9

Federal Statutes

18 U. S. C. § 1951 ..... 2, 4
18 U. S. C. § 1951 (b) (2) 5
18 U. S. C. § 1962 2

State Statutes

New York Field Code of Criminal Procedure 8
New York Penal Code § 613, Ch. 6 (1865) 8

Statutes

11 Hen. 7, ch.23 (1494) 6
2 & 3 Edw. 6, ch. 6 (1548) 6
21 Hen. 77, ch. 6 (1529 6
23 Hen. 8, ch. 9 (1531) 6
27 Eliz. ch. 6 (1585) 6
31 Eliz. ch. 6 § 2 (1589) 6
33 Hen. 8, ch. 39 (1541) 6
4 & 5 Phil. & M., ch. 3 (1557) 6
Westminster I, 3 Edw. c 26, 27, 28, 30, 31 (1285) 6
Westminster II c 13 Edw. (1285) 6

Federal Rules

Rule 37.6 1

Other Authorities

89 Cong. Rec. 3227 (1943) 8
91 Cong. Rec. 11,906 (1945) 8
BLACK'S LAW DICTIONARY 1078 (6TH ed. 1990) 5
Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990) 15

Griep, *A Study of Statutory Blackmail and Extortion in the Several States, 44 Mich. L. Rev. 461 (1945)* 7
OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2nd ed. 1989) 5

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSEPH SCHEIDLER, et al.

INTEREST OF THE AMICUS

Concerned Women for America ("CWA") has over 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA supports traditional values, encourages policies that strengthen families, and advocates virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education and policymaking which are consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

Theresa Schrempp, attorney for CWA, previously represented Dottie Roberts, one of the defendants in *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z. The *Roberts/Codispoti* case also involved protest at an abortion clinic.

---

[1] Pursuant to Rule 37.6, of the Rules of this Court, no counsel for a party authored this brief in whole or in part, and that no person or entity other than CWA and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for petitioner Joseph Scheidler, counsel for petitioner Operation Rescue and counsel for respondents have each consented to the filing of this amicus brief. The written consent of each counsel accompanies this brief.

In that case, as in the instant case, the jury found a RICO violation based on the trial judge's re-writing of the taking element of Hobbs' Act, 18 U. S. C. § 1951 to extend the "obtaining … from" language of the Act to include "part with." The judgment was reversed on appeal in *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863 (Ninth Cir. 1995) on *res judicata* grounds. Nonetheless, the *Feminist Women's Health Center* case, like the case before this Court, demonstrates that civil RICO, combined with a dangerously expansive definition of Hobbs Act extortion, requires courts to mete out Draconian punishment for minor offenses, thereby chilling protected speech. RICO thus becomes a crushing political weapon in the hands of those who would strive to stifle the voices of others with whom they disagree.

STATEMENT

Petitioners are individuals and organizations who oppose abortion. Respondents are organizations which promote or perform abortions. Respondents allege that the Petitioners violated the Racketeering Influenced Corrupt Organizations Act ("RICO") 18 U. S. C. § 1962, when they engaged in the predicate acts of extortion under the Hobbs Act, 18 U. S. C. § 1951.

Hobbs Act extortion is well-defined, requiring the extortionist to *obtain* property. Notwithstanding the clear requirement that a defendant "obtain" property from a victim, the lower court instructed the jury that the *obtaining* element is met if a plaintiff has "give[n] up" a property right "whether or not the extortion provided an economic benefit to [defendants]. Tr. 4987. In recent

years, similar instructions regarding extortion have been given in RICO cases involving political protest. *Feminist Women's Health Center*, W. D. Wa. C86-161-Z;[2] *Northeast Women's Center v. McMonagle* 868 F.2d 1342, (3rd Cir. 1989) *cert. denied* 493 U. S. 901 (1989).[3].

This judicial expansion of Hobbs Act extortion is not merely a technical change. In shifting from a requirement that a defendant obtain property to the lesser requirement that a plaintiff give up property, the court expanded the traditional requirements for extortion. The expanded definition of extortion transforms the Hobbs Act from a statute which was enacted to penalize a crime of acquisition to a statute which criminalizes political protest and civil disobedience.

One of the several questions presented on appeal in this important case is the propriety of the trial court's expansion of common law definition of extortion to non-acquisitive behavior. By this brief, the *amicus curiae* invites the Court's attention to law

---

[2] The Roberts/Codispoti jury was instructed that extortion involved activity "causing the plaintiffs to *part with* property or some valuable right." *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576; *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863 (9th Cir. 1995) ER 240-241.

[3] The District Court in *McMonagle* similarly charged the jury with "to part with" language. *McMonagle v. Northeast Women's Center, Inc.*, No. 88-2137 October, 1988, United States Supreme Ct., Petition for Certiorari, Appendix at 88.

and policy reasons to reject this expanded definition of extortion under the Hobbs Act.

SUMMARY OF ARGUMENT

The trial court awarded judgment based on a definition of Hobbs Act extortion that is contrary to the plain wording of 18 U. S. C. § 1951. The expansion of Hobbs Act extortion to non-acquisitive activities is inconsistent with basic principles of statutory construction, including the plain meaning rule, the common law meaning rule, and the principle of lenity. In the First Amendment area, the court has a duty to construe a statute to avoid constitutional difficulties.

The Seventh Circuit's opinion wholly disregards the requirement that a Hobbs Act defendant "obtain" property in order to commit the crime of extortion. The Seventh Circuit's re-writing of the Hobbs Act militates against the First Amendment rights of free speech, association, and assembly.

ARGUMENT

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAIN" PROPERTY.

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the court must look at the elements of the traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property.

18 U. S. C. § 1951 (b) (2) defines extortion as "obtaining" of property from another.[4] That words be given their ordinary meaning is the fundamental rule of statutory interpretation. *Russello v. United States,* 464 U. S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[5] and "to come into possession or enjoyment of (something) by one's own effort, or by request [.]"[6] The plain meaning of the Hobbs Act, as demonstrated by its history, does not extend to instances in which neither the defendant nor a related third party acquired something. That the plaintiff parted with or gave up something is not legally relevant.

Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *U. S. v. Dotterweich,* 320 U. S. 277, 286 (1943) ("Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably'

---

[4] Section 1951 (b) (2) defines extortion as:

The term "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right". (emphasis added)

[5] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6TH ed. 1990).

[6] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; …hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2nd ed. 1989).

within the confines of the statutes. (citations omitted)". *See, also, United States v. Wiltberger,* 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, the court must strictly construe all language, resolving any ambiguity in favor of lenity. *United States v. Chestnut,* 394 F. Supp. 581, 591 (S.D.N.Y. 1975) (holding that the narrow construction of criminal statute meets "least drastic means" test), *aff'd,* 533 F.2d 40 (2nd Cir.), *cert. denied,* 429 U. S. 829 (1976).

B. Common Law Extortion Required That The Defendant Obtain Property.

Common law required a taking of property to complete the offense of "extortion." Since 1285, extortion has required such a taking.[7] The requirement that the extortionist "obtain" or "receive" property were necessary elements of the crime throughout history.[8]

Although the scope of the common law offense was generally expanded by statute to include wrongful obtaining of property by a private person (as opposed to a public official) it nonetheless

---

[7] Westminster I, 3 Edw. c 26, 27, 28, 30, 31 (1285), Westminster II c 13 Edw. (1285).

[8] 11 Hen. 7, ch.23 (1494) (**receive** … by Color of their Office"); 33 Hen. 8, ch. 39 (1541) ("**receive** or take") (**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548) ("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557) ("exact, levy, *receive or take")* 21 Hen. 77, ch. 6 (1529*) ("take, receive or demand");* 23 Hen. 8, ch. 9 (1531) *("ask, demand, take or receive");* 27 Eliz. ch. 6 (1585) (**"receive,** take or have") 31 Eliz. ch. 6 § 2 (1589) ("have, **receive** or take"); 2 Jac., ch 5 (1604) ("take, **receive** or make benefit to his own use") (emphasis added)

continued to require an "obtaining" of property. Griep, *A Study of Statutory Blackmail and Extortion in the Several States, 44 Mich. L. Rev. 461 (1945).* Indeed, logic supports the proposition that crimes motivated by profit should be punished more severely than activity which is non-acquisitive in nature.

C. The Legislative History of the Hobbs Act Dictates the Necessity for the Element of "Obtain."

Congress enacted the Hobbs Act recapitulating the common law offense of "extortion." All federal statutes that codify traditional offenses are to be read as incorporating the historical elements of those offenses. *Morissette v. United States,* 342 U. S. 246 (1952);[9] *United States v. Bailey,* 444 U. S. 394 (1980).[10] Nothing in the codification suggests intent to remove the "obtaining" element. Accordingly, Hobbs Act extortion, like extortion defined at common law, is an acquisitive crime that requires a taking.

---

[9] In *Morissette v. United States,* 342 U. S. 246 (1952), the court held that even when the statute did not state a *mens rea* for the crime, the mens rea for larceny was applied because such an element was required under pre-existing common law.

[10] This court noted in *United States v. Bailey*, 444 U. S. 394, 415 n. 11 (1980), "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law … and that therefore [common law concepts] may have been contemplated by Congress [when criminal statutes are enacted]." It further held that "Anglo-Saxon tradition of criminal justice, [is] embodied in the United States Constitution and in federal statutes …" *Id.* at 414.

Following the cue of a large number of western state legislatures, Congress modeled its initial criminal code on the original New York Field Code of Criminal Procedure published in 1850. Congress, in enacting the Hobbs Act defining "extortion," took its relevant language from the same New York Field Code.[11] Accordingly, in interpreting the Hobbs Act, the New York Field Code and those cases construing it control.

Under New York law, as under the common law, the question of whether extortion occurred turned on whether the defendant intended to receive or procure money or property. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.

New York Field Code, Ch. 4 § 584 (emphasis added).

In *People v. Ryan,* 232 N.Y. 234, 133 N. E. 572, 573 (1921), a prosecution for blackmail, (one element of which was "the intent

---

[11] 89 Cong. Rec. 3227 (1943) (Statement of Hobbs) ("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also,* 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Field Code defines extortion as: "Extortion is the obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." New York Penal Code § 613, Ch. 6 (1865).

... to extort or gain any money or other property") the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the statute.[12] *See also, People v. Squillante,* 18 Misc.2d 561, 564, 185 N. Y. S.2d 357, 361 (1959) (In an extortion prosecution the court held that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something").

The Hobbs Act and case law interpreting the Hobbs Act expressly retain the requirement that property be "obtained." Congress used the term "obtaining" to affirm the requirement of the defendant's gain. Congress sought to punish only criminal activities that are motivated by profit or gain. Until *Northeast Women's Center v. McMonagle,* 868 F.2d 1342 (3rd Cir. 1989), *cert. denied,* 493 U. S. 901 (1989), no reported court had held that extortion occurs when neither the defendant nor a related third party receives a benefit.

Congress intended to limit the application of the Hobbs Act to those who wrongfully seek to gain property from another and this Court has strictly discerned and enforced that intent. This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs

---

[12] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan,* 133 N. E. 572, 573 (1921)

Act. *United States v. Enmons,* 410 U. S. 396 (1973). The defendants in *Enmons* did not violate the Hobbs Act because they neither intended nor acted to wrongfully enrich themselves or others, when they sought higher wages for work actually performed.

The Petitioners in this action were not business competitors of the Respondents. They stood to gain no economic benefit by their actions of engaging in sit-ins and demonstrations[13]. No related third party stood to gain any thing of value. Whatever else they might have been — no matter how much one may agree or disagree with their actions — they are not extortionists.

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT.

"Public-issue picketing" and political speech occupy the very highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown,* 447 U. S. 455, 467 (1980). Boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association are often coercive and intimidating. These forms of protected speech may result in economic loss to others. Those characteristics do not remove the

---

[13] In fact, it is unclear what "extortionate acts" the jury found in the instant case. *See, Appendix G* to Petition for Writ of Certiorari.

activities from First Amendment protection. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886 (1982).

In instances in which illegal activity occurs within the context of political protest, imposition of punishment by a court must be judged "'according to the strictest law'" in order to avoid infringement of First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 919 (1982) *quoting Scales v. United States*, 367 U. S. 203, 299-300 (1961).

In the instant case, the trial court not only declined to apply the "strictest law" doctrine in instructing the jury; it expanded the definition of extortion in a manner that would practically assure that free speech rights would be violated.

The Seventh Circuit dispensed with the requirement that a defendant "obtain" property in an extortion (or the attendant RICO) case. Without requiring the obtaining of property, *any* illegal activity, however minor or non-violent, is extortionate, *because* it occurs in the context of political protest.[14] The Seventh

---

[14] The RICO statute can and has been used against abortion protestors who engage in "classic" acts of civil disobedience. In *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z, the plaintiffs alleged that Hobbs Act extortion occurred when defendant Sharon Codispoti and one other person sat on the steps of a building occupied by several businesses including an abortion clinic. No violence, force, injury, or threat of injury was claimed. Plaintiffs also claimed "extortion" because the anti-abortion picketers parked in the public spaces in front of the clinic. *Feminist Women's Health Center v. Roberts, supra,* Docket No. 402. On appeal, the Ninth Circuit correctly noted that parking in a public place "was not unlawful." *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863, 865 (Ninth Cir., 1995)

Circuit's formulation of the Hobbs Act can be summarized as follows: Even minor, non-violent, illegal activity, (unprotected by the First Amendment, but often present in concerted political protest) coupled with political protest (protected, though inherently coercive) equals extortion, because (according to the Seventh Circuit) the plaintiff need not prove that the defendant obtained anything.

Shockingly, under this faulty definition of the Hobbs Act, (and the resulting expansion of RICO's application) political protesters who engage in an otherwise minor illegality will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct for non-political reasons, or for no reason. Defendants who engage in generic disorder will be dealt with, if at all, under state criminal laws and civil penalties for trespass, nuisance or similar claims for relief. Defendants who engage in identical acts in the context of attempting to persuade a business or an individual to change its course of conduct are liable under RICO. These defendants can be bludgeoned by their political opponents with claims of extortion and racketeering. The lower court's defective definition of extortion thus catapults an act of civil disobedience to a major felony.

Such an expansion of the Hobbs Act (and thus the RICO statute) if left in place, will have a profoundly chilling impact on all manner of political protest and on all acts of civil disobedience. By removing the element of acquisition, the Seventh Circuit allows

great mischief. Without requiring that an extortionist obtain property, the court will find extortion on proof that a defendant engaged in "wrongful use of actual or threatened force, violence or fear" and that issue becomes a factual question for a jury. Could anyone doubt that an Alabama jury would have found that the actions of Dr. King and others in engaging in technically illegal sit-ins on private property constituted "use of ... fear" against business owners and white customers, resulting in losses to the targeted businesses? In such a context, the chilling effect of the broadened definition becomes obvious.

Consider the holding of the Mississippi court reviewed by this Court in *NAACP v. Claiborne Hardware,* 458 U. S. 886, 895 (1982), that "many" black citizens were "overcome out of sheer fear" to "withhold their trade" from the complaining businesses. In reversing, this Court noted that the boycott included "elements of criminality and elements of majesty." The targeted businesses sustained economic losses. *NAACP v. Claiborne Hardware,* 458 U. S. 886, 888 (1982). Under the expanded definition of "extortion" formulated by the trial court and the Seventh Circuit, would not the participants in the *NAACP* boycott today be subject to RICO?

This threat to civil liberties is exacerbated by the fact that political speech often occurs in concert with others as in the instant case. Under the expanded definition of the Hobbs Act, a prosecutor (or civil RICO plaintiff) can assert extortion or RICO under vicarious liability theories of conspiracy and aiding and

abetting, if *any* member of the group engages in *any* illegal activity. Because a court may infer conspiracy from the facts,[15] a wholly innocent member of a loosely-affiliated group of protestors will likely find it impossible to secure a dismissal short of trial, if at all.[16]

No one suggests that a protestor who engages in wrongdoing should not be liable for his or her own criminal conduct.[17] The real question is: Should a political protestor's punishment be *enhanced* because the criminal activity occurred within the scope of a confrontive political protest? Such an enhancement of punishment is antithetical to the fundamental constitutional principle which holds that illegal activity, in the context of political speech, must be subjected to the "strictest law." *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 919 (1982), (citing *Noto v. United States,* 367 U. S. 290, 299 (1960).

---

[15] *Ianelli v. United States,* 420 U. S. 770, 777, n. 10 (1975)

[16] In the *Feminist Women's Health Center v. Roberts,* W. D. Wa. C86-161-Z, 18 defendants were initially named. After a number of parties were dismissed by the court or by the plaintiffs, six parties proceeded to trial. Judgment was entered against three defendants. *Feminist Women's Health Center v. Roberts,* W. D. C86-161Z, Docket # 691, 693. The judgment was reversed by the Ninth Circuit. *Feminist Women's Health Center v. Codispoti,* 63 F.3rd 863 (9th Cir. 1995).

[17] Punishment for criminal conduct within the scope of political protest is, of course, subject to the "precision of regulation" standards demanded by *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 916 (1981), (citing *NAACP v. Button, 371 U. S. 415, 438 (1963)).*

The looming specter of a RICO liability will surely cast fear into the hearts of all citizens who choose to publicly and vigorously demonstrate their message. Where the protesting citizens' political opponents are both powerful and well financed, as they are in this case, the threat of a ruinous racketeering lawsuit will chill — nay, freeze — the free speech rights guaranteed by the Constitution. RICO cases are notoriously costly, frustratingly complex, and seemingly endless.[18] One writer has noted that:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit....{C}ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat.

Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990)

Statutory interpretation requires that statutes be construed in order to *avoid* punishing activities which are protected by the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92 (1971). Ironically, in this case, and in *Codispoti* and *McMonagle*, the district court re-defined an otherwise unobjectionable criminal statute in a manner which punished the exercise of free speech rights. The judicial overhaul of the Hobbs Act is wholly improper and unconstitutional.

---

[18] The instant case is now in its fifteenth year of litigation. The defendants in *Feminist Women's Health Center* v. *Codispoti*, 63 F.3rd 863, 865, (Ninth Cir. 1995), endured nearly a decade of "RICO hell." The case was filed in 1986, went to trial in 1989 and was reversed by the Ninth Circuit in 1995. The judgment was reversed the judgment because (...continued)

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

Theresa Schrempp
SONKIN & SCHREMPP, PLLC
Eightieth Avenue Professional Building
2955 80th Avenue SE, Suite 201
Mercer Island, Washington 98040-2960
(206) 275-2878

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, Washington 98104
(206) 903-1800

March 2, 2002

---

the *defendants had been sued once before* (in state court in 1983) which resulted in finding of *res judicata*.

Supreme Court U.S.
FILED
MAR 1 2002
OFFICE OF THE CLERK

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH S. HEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATE OF ALABAMA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

BILL PRYOR
Attorney General of Alabama

MARGARET L. FLEMING
CHARLES B. CAMPBELL*
Assistant Attorneys General
Counsel of Record *

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for *Amicus Curiae*, the State of Alabama

18pp

QUESTIONS PRESENTED

This brief for *amicus curiae* will address the following two questions presented in the petition for a writ of certiorari in No. 01-1119:

1. Whether the Seventh Circuit erred in ruling, in conflict with the Ninth Circuit, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

2. Whether the "obtaining of property" element of the federal extortion statute, which is a predicate offense for civil RICO, may be satisfied, as the Seventh Circuit held, merely by a showing of "interference with the rights" of another?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Brief for *Amicus Curiae* in Support of the Petitions for Writs of Certiorari 1

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

I. The Creation of an Implied Private Equitable Action Under Civil RICO Violates this Court's "Particular Understanding of the Genesis of Private Causes of Action." 5

II. The Expansion of the Hobbs Act to Prohibit Conduct that Does not Involve "the Obtaining of Property" Raises the Specter of Unnecessary Civil RICO Litigation Against State Officials. 6

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 2–6

Carpenter v. *United States*, 484 U.S. 19 (1987) 8

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226 (1897) 11

Evans v. *United States*, 504 U.S. 255 (1992) 10

Guerrero v. *Gates*, 110 F. Supp. 2d 1287 (C.D. Cal. 2000) 9

In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.), 770 F.2d 328 (2d Cir. 1985) 10

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 4

Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) 7

Northeast Women's Ctr., Inc. v. *McMonagle*, 868 F.2d 1342 (3d Cir. 1989) 7–8

Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 11

United States v. *Anderson*, 716 F.2d 446 (7th Cir. 1983) 7

United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999) 7

TABLE OF AUTHORITIES—*Continued*

Page(s)

United States v. *Debs*,
949 F.2d 199 (6th Cir. 1991) 7

United States v. *Hoelker*,
765 F.2d 1422 (9th Cir. 1985) 8

United States v. *Nadaline*,
471 F.2d 340 (5th Cir. 1973) 8

United States v. *Panaro*,
266 F.3d 939 (9th Cir. 2001) 9

United States v. *Provenzano*,
334 F.2d 678 (3d Cir.1964) 9

United States v. *Santoni*,
585 F.2d 667 (4th Cir. 1978) 8

United States v. *Stillo*,
57 F.3d 553 (7th Cir. 1995) 7

United States v. *Stephens*,
964 F.2d 424 (5th Cir. 1992) 7

Williamson v. *Lee Optical Co.*,
348 U.S. 483 (1955) 11

Constitutional Provisions:

U.S. Const. amend. XIV, §1 10

Statutes:

18 U.S.C. § 1951 (2000) 2, 6, 7, 8

18 U.S.C. § 1961(1)(B) (2000) 7

TABLE OF AUTHORITIES—*Continued*

Page(s)

18 U.S.C. § 1964 (2000) 2–5

Other Authorities:

Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) 9

Sup. Ct. R. 37.4 1

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The State of Alabama respectfully submits this brief as *amicus curiae* pursuant to Supreme Court Rule 37.4. The State of Alabama submits this brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF *AMICUS CURIAE*

State governments have a profound interest in protecting the First Amendment rights of their citizens. State officials are also named as defendants in innumerable lawsuits alleging State interference with various constitutional or statutory rights. In the context of this case, then, *amicus curiae* has a dual interest in seeing that its citizens' constitutionally protected interest in conducting legitimate, peaceful protests is not chilled by an unwarranted threat of civil RICO litigation and seeing that its State officials do not face an unwarranted threat of civil RICO litigation arising from an overly expansive interpretation of the scope and purpose of that statute and the Hobbs Act.

SUMMARY OF ARGUMENT

Last term, in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court explained its "particular understanding of the genesis of private causes of action." *Id.* at 286. The decision below, which found an implied private cause of action for injunctive relief in the civil RICO statute, 18 U.S.C. § 1964 (2000), is inconsistent with this Court's holding in *Sandoval*. The text of the civil RICO statute manifests a congressional intent to authorize the Attorney General to seek injunctive relief under RICO, but to authorize private persons to seek only treble damages, costs, and attorney's fees. Nowhere does the statute authorize private entities to seek injunctive relief under RICO, and Congress has repeatedly refused to amend the civil RICO statute to create such a private cause of action for injunctive relief. Unfortunately, the creation of a private cause of action for injunctive relief under civil RICO further chills legitimate activity protected by the First Amendment.

The expansion of the definition of "extortion" under the Hobbs Act, 18 U.S.C. § 1951 (2000), by the Seventh Circuit to prohibit conduct that does not involve "the obtaining of property" raises the specter of unwarranted civil RICO litigation against State officials. By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. This interpretation could subject almost any State regulation of economic activity or property to civil RICO litigation. It also expands civil RICO to chill activity protected by the First Amendment in which protesters or demonstrators do not obtain property of any kind. Such untoward results are avoided by simply applying the Hobbs Act as written, to require an "obtaining of property."

ARGUMENT

I. THE CREATION OF AN IMPLIED PRIVATE EQUITABLE ACTION UNDER CIVIL RICO VIOLATES THIS COURT'S "PARTICULAR UNDERSTANDING OF THE GENESIS OF PRIVATE CAUSES OF ACTION."

As petitioners have pointed out, the creation in this case of an implied private right of action to obtain injunctive relief under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. § 1964 (2000), creates a split in the circuits and contravenes the holding or dicta of nearly every decision to address the subject. Pet. in No. 01-1118 at 6–10; Pet. in No. 01-1119 at 10–12 & nn. 17 & 18. Petitioners also correctly summarize the inconsistency between the holding of the Seventh Circuit and the precedent of this Court, and the lack of support for the holding below in the text and history of RICO. Pet. in No. 01-1118 at 11–14; Pet. in No. 01-1119 at 12–19.

The holding of the Seventh Circuit also violates the basic understanding of implied causes of action expressed last term in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In that decision, the Court observed:

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter

> how desirable that might be as a policy matter, or how compatible with the statute. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

Alexander v. *Sandoval*, 532 U.S. at 286–87 (citations omitted) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment)). While the court below cited *Sandoval*, Pet. App. in No. 01-1119 at 8a, its analysis is inconsistent with the "particular understanding of the genesis of private causes of action" expressed in that decision.

The civil remedies provision of RICO, 18 U.S.C. § 1964, provides, in pertinent part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) *The Attorney General may institute proceedings under this section.* Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) *Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains* and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(a)–(c) (emphasis added).

The statute specifically provides that only the Attorney General "may institute proceedings under" § 1964. 18 U.S.C. § 1964(b). Unlike the Attorney General, private persons are not authorized to 'institute proceedings under" § 1964 generally. Instead, private persons have the far more limited ability to sue for business or property injuries sustained "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Recovery by private plaintiffs is limited to treble damages, costs, and attorney's fees, *id.*; nowhere does § 1964(c) authorize private persons to sue for injunctive relief under § 1964(a). As this Court noted in *Sandoval*, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. This is especially the case when the other method of enforcement (i.e., by the Attorney General) is specified in the immediately preceding subsection.

Given the plain text of the statute and the marked difference between the broad authority granted the Attorney General to sue under § 1964 and the limited authority granted private parties to sue only for damages, the Seventh Circuit's "parity of reasoning" approach, Pet. App. in No. 01-1119 at 10a, was inappropriate. That approach renders the differences between the statutory

language in § 1964(b) and § 1964(c) meaningless. It effectively amends § 1964(c) to state that a person injured by a violation of § 1962 "shall recover [, *in addition to any relief authorized in subsection (a) to which he is entitled,*] threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee." Congress had (and has) the ability to write the statute that way, of course, but has repeatedly chosen not to do so. See Pet. in No. 01-1119 at 16–19 & n.22 (recounting history of attempts to amend RICO to authorize private injunctive actions). The federal courts should not, therefore, create that result "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287.

In the context of this case, moreover, the addition of private injunctive remedies to the already powerful treble damages available to private persons is hardly desirable as a policy matter. The application of civil RICO to political or social protest activities has a substantially chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further.

II. THE EXPANSION OF THE HOBBS ACT TO PROHIBIT CONDUCT THAT DOES NOT INVOLVE "THE OBTAINING OF PROPERTY" RAISES THE SPECTER OF UNNECESSARY CIVIL RICO LITIGATION AGAINST STATE OFFICIALS.

A second, particularly troubling feature of the Seventh Circuit's decision is its interpretation of the "obtaining of property" element in the definition of extortion under the Hobbs Act, 18 U.S.C. § 1951 (2000). The Hobbs Act

defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). An act indictable under the Hobbs Act, in turn, is a predicate act under RICO. 18 U.S.C. § 1961(1)(B) (2000).

The court of appeals noted that the Seventh Circuit "has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and chose not to revisit that holding. Pet. App. in No. 01-1119 at 36a (citation omitted) (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)). The court then rejected the defendants' argument "that, even if 'property' was involved, the defendants did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Id.* The court of appeals observed that according to Seventh Circuit precedent, " 'as a legal matter, and extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.' " *Id.* (quoting *United States* v. *Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

The difficulty with the Seventh Circuit's interpretation is not one of applying the Hobbs Act to intangible property. Pet. App. in No. 01-1119 at 36a (citing *Anderson*, 716 F.2d at 450); *see United States* v. *Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (Hobbs Act concept of property "is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business"); *Libertad* v. *Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d

1342, 1350 (3d Cir. 1989) ("[O]ther circuits which have considered this question are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property."); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (binding precedent in both Fifth and Eleventh Circuits); *see also Carpenter* v. *United States*, 484 U.S. 19, 25–27 (1987) (applying mail fraud statute to intangible property).

The primary flaw in the Seventh Circuit's interpretation is that, under the Hobbs Act definition of extortion, someone must *obtain* (or attempt or conspire to obtain)[1] the victim's property—whether tangible or intangible. As Petitioner points out, the Ninth Circuit has held that this "obtaining" element is critical to finding a violation of the Hobbs Act:

> The four conspirators sought not only to put Blitzstein [the victim] out of business, but actually to get his business interests for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof." But under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone—either the extortioner or a third person—must receive the property of which the victim is deprived.

[1] *See* 18 U.S.C. § 1951(a) ("or attempts or conspires so to do"). As used hereinafter, references to "obtaining" include attempting to obtain or conspiring to obtain.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (citations omitted) (quoting *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.1964)).

By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. As Petitioner asserts, this interpretation "creates considerable mischief for government actors." Pet. in No. 01-1119 at 20. Perhaps not every act of official misconduct would implicate the kind of intangible economic interests protected by the Hobbs Act and civil RICO. *But see* Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) (advocating use of civil RICO against police for repeated civil rights violations, based on victims' pecuniary losses); *Guerrero* v. *Gates*, 110 F. Supp. 2d 1287, 1292–93 (C.D. Cal. 2000) (denying motion to dismiss civil RICO action against police officers based on plaintiff's pecuniary losses said to result from alleged police misconduct). Many official actions—such as permitting and regulatory activities—certainly would implicate economic interests, however. Pet. in No. 01-1119 at 21. If "obtaining" tangible or intangible property were not required in order to violate the Hobbs Act, then virtually any State action that affected economic interests could conceivably become the subject of civil RICO litigation. Moreover, if the Hobbs Act applies to interference with *any* rights (even non-economic rights) of the victim, as the Seventh Circuit seems to hold, Pet. in No. 01-1119 at 35a–36a (identifying "the class women's rights to seek medical services from the clinics"), the

expansion of the Hobbs Act and civil RICO is truly breathtaking—and troubling.

This is not to suggest that State officials are immune from the Hobbs Act. For example, State officials and other State actors are properly subject to prosecution under the Hobbs Act for accepting bribes. *See, e.g.*, *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (county commissioner). In one unsettling court of appeals decision, the Second Circuit even cited the Hobbs Act in upholding a preliminary injunction prohibiting the attorneys general of 31 States from filing administrative or criminal actions that would affect the rights of any plaintiff or purported class member in ongoing federal multidistrict securities litigation. *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 341 (2d Cir. 1985). The court of appeals held that the district court "properly concluded ... that the states would be violating federal law *if* they should bring administrative and criminal proceedings in order to induce the defendants to contribute more toward the settlement being reached in the federal court." *Id.* The court of appeals also held that a State's right to pursue criminal or regulatory actions was protected by sovereign immunity "unless the state action violates the Constitution or federal law, *provided the proceedings are not being used by the state as a means of coercing the defendants into increasing a civil settlement offer to persons who might be represented by the state*, *see, e.g.*, 42 U.S.C. § 1983 (1982); 18 U.S.C. § 1951 (1982)." *Id.* (emphasis added).

These cases, however, applied traditional principles regarding the "obtaining of [tangible or intangible] property"—either by the State official or by third parties on whose behalf or in whose interest the State official was acting. Removing the "obtaining" element substantially

broadens the Hobbs Act definition of extortion to apply to almost any form of State economic or environmental regulation. This opens the way for civil RICO litigation over a host of governmental decisions that inevitably have economic impact.

Such a result is entirely unnecessary. The Due Process Clause of the Fourteenth Amendment already provides protection from arbitrary or irrational State interference with economic and property interests. U.S. Const. amend. XIV, § 1; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487–88 (1955). The Due Process Clause also incorporates the Fifth Amendment protection against the taking of private property by States without just compensation. *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 2457 (2001) (citing *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897)). Allowing civil plaintiffs to litigate State regulation of economic activities under civil RICO would be both burdensome and counterproductive. Insofar as the holding of the Seventh Circuit opens the way for civil RICO litigation involving alleged interference with non-economic rights, the burden would be all the more egregious.

Such untoward results are avoided by the application of the plain meaning of the phrase "obtaining of property" under the Hobbs Act. Requiring property to be *obtained*, as stated in the statute, avoids the unnecessary application of civil RICO to State regulatory activities in which government seeks to regulate, but not to obtain, economic or property interests. It also avoids the serious First Amendment concerns raised by the application of civil RICO to protest activities in which protesters do not obtain the property of others.

CONCLUSION

The petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama

MARGARET L. FLEMING
CHARLES B. CAMPBELL*
*Counsel of Record**
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for *Amicus Curiae*, the State of Alabama

March 4, 2002

MAR 4 - 2002

No. 01-1118

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF PETA IN SUPPORT OF PETITIONERS

JEFFREY S. KERR
General Counsel
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.
501 Front Street
Norfolk, VA 23510
(757) 622-7382

CRAIG M. BRADLEY *
James L. Calamaras
Professor of Law
INDIANA UNIVERSITY SCHOOL OF LAW
Bloomington, IN 47405
(812) 855-1257

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

2 Opp

IN THE

Supreme Court of the United States

No. 01-1118

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization dedicated to exposing and ending animal abuse and suffering wherever it occurs through peaceful direct action and social advocacy. PETA enjoys the support of more than 750,000 members and supporters who represent this country's diverse population and include children, homemakers, scientists, teachers, member of religious groups of many different denominations, and elected representatives on both sides of the aisle. Consistent with this nation's greatest traditions of civil disobedience, PETA's nonviolent social advocacy in furtherance of its charitable animal protection mission often involves protests similar to certain

conduct of the petitioners in this case. The Seventh Circuit's opinion below threatens this exercise of PETA's First Amendment rights by holding that such protest activities violate the Hobbs Act and state extortion laws, and consequently the Racketeer Influenced Corrupt Organizations (RICO) statute under 18 U.S.C. §1961 *et seq*.

Therefore, we respectfully request this Court to accept the attached brief in support of the petition for certiorari in this case. Petitioners have consented to the filing of this brief, respondents have not consented.

Respectfully submitted,

JEFFREY S. KERR
General Counsel
PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.
501 Front Street
Norfolk, VA 23510
(757) 622-7382

CRAIG M. BRADLEY *
James L. Calamaras
Professor of Law
INDIANA UNIVERSITY SCHOOL
OF LAW
Bloomington, IN 47405
(812) 855-1257

* Counsel of Record

QUESTION PRESENTED

Whether the application of RICO to the petitioners' political protest activities violates the First Amendment where no true extortion was established, and no particular acts of extortion were specified in the jury verdict.

DISCLOSURE STATEMENT

I am a Professor of Law at Indiana University and a member of the bar of this Court. Following this Court's decision in *NOW v. Scheidler*, 510 U.S. 249 (1994), I published an article on the Court's decision, *NOW v. Scheidler, RICO Meets the First Amendment*, 1994 Supreme Court Review 129 (1995). The article agreed with the Court's holding that RICO could apply to a political action organization and went on to consider the problems facing the plaintiffs in the civil RICO suit that would then go forward. I concluded that the allegations made in the plaintiff's (respondent NOW's) complaint were inadequate to constitute a violation of RICO and raised serious First Amendment concerns. I had no connection to petitioners prior to publication of the article. Some time after this publication, I was retained by petitioners as a consultant to assist in their appeal to the Seventh Circuit, but I am no longer in their employ. I have been retained by PETA to prepare and file this brief.

Craig M. Bradley

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
APPLICATION OF THE HOBBS ACT AND RICO TO THE ACTIONS OF THE PETITIONERS IN THIS CASE IS A CLEAR VIOLATION OF THE FIRST AMENDMENT	3
ARGUMENT	5
I. TREBLE DAMAGES AND COUNSEL FEES ARE NOT APPROPRIATE AGAINST A SOCIAL PROTEST ORGANIZATION UNDER THE FACTS OF THIS CASE	5
II. THE DAMAGES WERE NOT LIMITED TO "LOSSES PROXIMATELY CAUSED BY UNLAWFUL CONDUCT."	6
III. NONE OF THE ACTS ALLEGED IN THE COMPLAINT CONSTITUTE VIOLATIONS OF THE HOBBS ACT, OR EXTORTION UNDER STATE LAW, AND THE JURY VERDICT WAS INADEQUATE AS TO THESE CRIMES	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Carpenter v. U.S., 484 U.S. 19 (1987) 9
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) ..... *passim*
NOW v. Scheidler, 510 U.S. 249 (1994) 5, 6, 7, 9
Richardson v. U.S., 528 U.S. 813 (1999) 10
U.S. v. Enmons, 410 U.S. 396 (1973) 10

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution, *First Amendment* ..... *passim*
Continuing Criminal Enterprises, 21 U.S.C. § 448 ..... 10, 11
Freedom of Access to Clinic Entrances, 18 U.S.C. § 248(a) 3, 4
Hobbs Act, 18 U.S.C. § 1951 ..... *passim*
Mail Fraud, 18 U.S.C. § 1341 9
Racketeer Influenced & Corrupt Organizations ("RICO"), 18 U.S.C. §§ 1961 et seq. ..... *passim*

OTHER AUTHORITIES

C. Bradley, Racketeers, Congress and the Courts: Analysis of RICO, 65 Iowa L.R. 837 (1980) 6
C. Bradley, *NOW v. Scheidler*: RICO Meets the First Amendment, 1994 Supreme Court Review 129 (1995) 4, 10
Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103d Congress, 1st Session, April 1 and June 10, 1993 4
Hearings before the Senate Committee on Labor and Human Resources, 103d Congress, 1st Session , May 12, 1993 4

TABLE OF AUTHORITIES—Continued

Page

Hearings on Matters Relating to Organized Crime Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Congress, 1st Session 449 (1969) 6
LaFave and Scott, Substantive Criminal Law, Vol. II (1986) 10

IN THE

Supreme Court of the United States

No. 01-1118

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF PETA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST [1]

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization that uses peaceful means to expose and end animal abuse wherever it occurs. When PETA hears allegations of abuse, it thoroughly investigates the

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

allegations and reports its findings to the proper authorities. PETA's actions closely resemble those of many social advocacy groups throughout the country's history, each of which has, in its time, incurred the wrath of those who wish no public scrutiny and no change in the status quo. PETA supporters also occasionally engage in non-violent civil disobedience to call public attention to laws or practices that they find objectionable consistent with the greatest protest traditions of this nation. In short, PETA engages in protest activity similar to that of petitioners. (An example of this is PETA's successful campaign to convince McDonald's, Burger King, and Wendy's fast-food restaurants to demand more humane animal care standards of their suppliers.)

Yet, the Seventh Circuit labeled the petitioners' non-violent civil disobedience as "extortionate threats" in violation of the Hobbs Act, 18 U.S.C. §1951, and as composing a "pattern of racketeering activity" in violation of RICO. In this regard, the Seventh Circuit's opinion is in direct contravention of the First Amendment as explicated by this Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

PETA's interest is not purely hypothetical. In 1997, PETA was sued under RICO for its investigation and exposure of animal cruelty at a New Jersey animal testing laboratory even though the United States Department of Agriculture fined the lab $50,000 for federal law violations found as a result of PETA's complaint. *Huntingdon Life Sciences, Inc. v. Rokke et al.* (E.D.VA 2:97CV597) (case settled). Other animal protection activists have been sued under RICO for peaceful protests and non-violent civil disobedience outside of a fur store. *Jacques Ferber, Inc. v. Bateman et al.* (E.D. PA 99 CIV 2277) (case settled). PETA will not stop speaking out for animal protection. It will continue to shine the bright light of public scrutiny into the dark corners where animals suffer and it will continue to vigorously challenge companies and consumers to change their attitudes toward the use and abuse of animals.

Therefore, the Seventh Circuit's opinion threatens PETA with the continued prospect of federal court injunctions, treble damage civil suits and even possible federal prosecution as it carries out its political protest activities.

PETA also has a long-standing interest in this case as an *amicus*. PETA was granted permission to serve this Court in that capacity in its initial consideration of this case in 1994, and PETA likewise served the Seventh Circuit, both in 1994 and 1999 following this Court's remand.

PETA expresses no view on the issue of abortion. Its interests in this case relate solely to the legal issues raised in this brief and in the petition for certiorari.

SUMMARY OF ARGUMENT

APPLICATION OF THE HOBBS ACT AND RICO TO THE ACTIONS OF THE PETITIONERS IN THIS CASE IS A CLEAR VIOLATION OF THE FIRST AMENDMENT.

Petitioners are members of an unpopular political advocacy movement. While their general anti-abortion position is shared by many Americans, the tactics they employ—blockading clinics, harassing patients and staff, etc.—are widely condemned. Nor are these petitioners necessarily innocent of all criminal activity. There is ample evidence in the record in this case suggesting violations of state trespassing, destruction of property, and perhaps other laws, and the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. §248 (a),[2] as well as (disputed) evidence of a few acts and threats of violence.[3]

---

[2] Under FACE, 18 U.S.C. §248 (a),an individual may be subject to civil or criminal penalties if he

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to

However, as explained in my Supreme Court Review article,[4] violation of these statutes does not constitute a violation of RICO because neither FACE, trespassing, nor "acts or threats of violence" are among the listed "predicate crimes" necessary to constitute a RICO violation.[5] Indeed, the reason that the FACE statute was demanded by pro-choice advocates was because existing federal and state laws (including, presumably, RICO and extortion) were inadequate.[6] And, although respondent's complaint makes references to such crimes as murder, arson, and kidnapping committed by certain anti-abortion zealots, there was no proof of any such crimes having been committed by the petitioners in this case, and these claims were summarily dismissed.[7] Accordingly, the jury

injure, intimidate or interfere with any person because that person is or has been , or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services. . .

(3) intentionally damages or destroys the property of a facility or attempts to do so, because such facility provides reproductive health services.

[3] The jury found four (unspecified) "acts or threats of physical violence" against petitioners. Pet. App. p. 160a.

[4] Craig Bradley, *NOW v. Scheidler, RICO Meets the First Amendment,* 1994 Supreme Court Review 129 (1995). (Hereinafter referred to as *Bradley, First Amendment*).

[5] *See* 18 U.S.C. §1961 setting forth a lengthy list of RICO predicate crimes.

[6] Attorney General Reno testified that "existing Federal laws, while perhaps applicable in some instances, (are) inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong., 1st Sess., p. 8 (May 12, 1993). Likewise, Rep. Schumer, Chairman of the House Subcommittee considering the Bill opined that "(t)he state laws are inadequate to deal with the problem." Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103rd Cong., 1st Sess., p. 1 (April 1 and June 10, 1993).

[7] Judge Coar's Order of Sept. 23, 1997, p. 40.

verdict against petitioners was based entirely on over twenty violations of the Hobbs Act, under federal law, and a similar number of acts of "extortion" under state law.[8] However, just what acts or threats the jury might have been referring to in this verdict were never specified, and the trial judge refused petitioners' request to ask the jury to be specific.

Even more fundamentally, the judgment against these defendants under RICO, and especially the imposition of treble damages, violates the First Amendment, as this Court made clear in *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982). Reservations about subjecting such defendants to civil RICO were expressed by Justice Souter, concurring in *NOW v. Scheidler*, 510 U.S. 249, 263 (1994)(*NOW I*). He noted that "(c)onduct alleged to be Hobbs Act extortion may turn out to be fully protected First Amendment activity. . . . And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." *Id.* at 264. There follows a discussion of why a RICO suit is inappropriate in this case.

ARGUMENT

I. TREBLE DAMAGES AND COUNSEL FEES ARE INAPPROPRIATE AGAINST A POLITICAL ADVOCACY ORGANIZATION, AT LEAST UNDER THE FACTS OF THIS CASE

Claiborne holds that when political protest, which petitioners' conduct unquestionably is, is subjected to a damage suit, damages must be limited to the "direct consequences of (violent) conduct" and may not be "award(ed) . . . for the

[8] *See Pet.* App. 159a-160a (Special Interrogatories and Verdict form) (finding 25 violations of state extortion laws and 21 violations of federal extortion law). It is not specified whether any of these "extortion" crimes were related to the four "acts or threats of violence" also found by the jury.

consequences of nonviolent protected activity." 458 U.S. at p. 918. Thus, even if respondent established that its clients suffered financial injury in the amounts found in the jury verdict, it would have to establish that these were all due to those limited aspects of the petitioners' behavior that were violent. Even conduct that is illegal, such as trespassing and interfering with access to clinics through non-violent behavior, may not, under *Claiborne* be subject to damages. Nor, of course, may the legitimate aspects of petitioners' behavior. Treble damages and counsel fees under RICO, even if RICO is applicable, are clearly not allowed. RICO was designed to destroy the organizations to which it was applied, in part through the use of the treble damage remedy.[9] Such "destruction" is inappropriate as to a First Amendment protest organization. Damages limited to "direct consequence of violent conduct" do not include treble, or other punitive, damages, costs or counsel fees.

II. THE DAMAGES IN THIS CASE WERE NOT LIMITED TO "LOSSES PROXIMATELY CAUSED BY UNLAWFUL CONDUCT"

It seems clear, based on both the majority and concurring opinions in *NOW v. Scheidler*, as well as *Claiborne Hardware*, that a political advocacy group that engages in acts of violence may be subjected to both prosecution and civil suit under RICO, (but not treble damages). For example,

[9] "The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those in jail." Hearings on Measures Relating to Organized Crime Before the Subcommittee on Criminal Laws and Procedures of the Sen. Comm. of the Judiciary, 91st Cong. 1st Sess. 449 (1969) (President's message on Organized Crime). See generally Craig Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L.R. 837 (1980), for an early, and relatively succinct, analysis of RICO's provisions.

as Justice Souter noted in *NOW I*, "we need not fear chilling" "ideological groups whose members commit acts of violence." 510 U.S. at 264. However, in *Claiborne Hardware*, which involved a mostly non-violent boycott of white merchants by the NAACP but which also involved some acts and threats of violence, the Court addressed itself to advocacy groups that may commits acts of violence:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence or threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . 458 U.S. at 916 . . . . Only those losses proximately caused by unlawful conduct may be recovered. *Id.* at 918.

Furthermore,

> The burden of demonstrating that (the taint of violence) which colored some acts, colored the entire effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. 458 U.S. at 933.

Yet, at this trial, as Judge Coar found in his opinion following the verdict, "the jury did not state which defendants did these acts or when they occurred, only the total number of acts." Pet. App. 126a. Indeed, he refused to require any specificity of proof despite the objection of the defense attorney that such specificity was necessary to adequately defend this case.[10] In order to hold members of an advocacy

[10] **Counsel for Defendants:**"Your honor . . . we urge that the plaintiff should list in the special interrogatories each particular incident they

group responsible for acts of violence the evidence must show which defendant did what at what time. It is not enough to show that there were violent acts committed by unidentified anti-abortion protestors, as cited by Judge Coar (Pet. App. 110a-113a), without tying them to particular acts of these defendants.[11] This violates the "precision of regulation" required by *Claiborne*, set forth above. Indeed, many of the acts cited by the respondent in its complaint were not committed by any of the petitioners or by people who were associated with their organizations.

III. NONE OF THE ACTS ALLEGED IN THE COMPLAINT CONSTITUTE VIOLATIONS OF THE HOBBS ACT, OR EXTORTION UNDER STATE LAW AND THE JURY VERDICT WAS INADEQUATE AS TO THESE CRIMES

The jury verdict is based on violations of the Hobbs Act[12] and "extortion under state law," both of which are "pattern

---

allege to constitute an act of force, threat or violence sufficient to be extortion." **The Court**: "Absolutely not." Tr. Trans. p. 4495.

[11] Claiborne:

> The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another . . . '(B)lanket prohibition of association with a group having both legal and illegal aims' would present a 'real danger that legitimate political expression or association would be impaired.' . . . To punish association with such a group there must be 'clear proof that a defendant specifically intends to accomplish the aims of the organization by resorting to violence.'. . . This intent must be judged 'according to strictest law,' for otherwise there is a danger that one in sympathy with the legitimate aims of such a group, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes . . . . 458 U.S. at 918-19 (citations omitted.).

[12] The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

> (a) Whoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in

crimes" under RICO. However, as the Hobbs Act provides, and as is the case with most state extortion laws,[13] an element of that crime is *"obtaining property."* Yet in his instructions to the jury the judge specifically informed the jury that they could ignore this element: "(P)laintiffs must show that defendants . . . cause(d) . . . (various plaintiffs) to give up a property right."[14] *"It does not matter whether or not the extortion provided an economic benefit to PLAN."* [15] Thus, though the RICO concept of "enterprise" is not limited to those organizations that have an economic goal, as this Court held in *NOW I*, in this case, the crime of extortion *does* require, as the Hobbs Act states, that the defendant seek to "obtain property."

The crime of extortion, as exemplified by the Hobbs Act, is not committed by forcing someone to do something against their will. That is the crime of criminal coercion, which is not included among the pattern crimes of RICO. While the obtainment of *intangible* property can certainly satisfy the "obtaining property" element of the Hobbs Act,[16] it was an

---

> commerce b[illegible]obbery or extortion or attempts or conspires so to do, or commit[illegible]hysical violence to any person or property in furtherance o[illegible] plan or purpose to do anything in violation of this section shall be fined, etc.
>
> * * *
>
> (b)(2) The term extortion *means the obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (emp. added).

[13] It was not specified by the jury which state's extortion laws had been violated by the defendants.

[14] Transcript at p. 4945.

[15] *Id.* (emphasis added).

[16] *See, e.g., Carpenter v. United States*, 484 U.S. 19 (1987) (holding that this will satisfy the implied element of property obtainment in the mail fraud statute, 18 U.S.C. §1341).

unjustified reading of that statute by the trial judge in this case to conclude that the element of "obtaining property" did not in fact require that the defendant actually obtain any property, but merely caused the plaintiff to forego a property right:

> The Hobbs Act was drawn from New York's Field Code. Under that code it was well-settled that extortion required an unlawful taking. As the New York cases cited by the Supreme Court in *United States v. Enmons* make clear, an accused could not be guilty of extortion unless he "was actuated by the purpose of obtaining a *financial benefit* for himself. . . .[17]

It is true, that in some states, "extortion" is not limited to "obtaining property" but may include "criminal coercion" as well.[18] However, since the jury did not specify which conduct constituted "extortion under state law," much less what state this conduct occurred in, we have no way of knowing whether the "extortions" found by the jury occurred in the few states that do not limit extortion to obtainment of property by the petitioners.

Furthermore, many of the "threats" issued by petitioners were threats of demonstrations or harassment, not of violence, and thus cannot be the basis of a charge of extortion against a political advocacy organization.

In *Richardson v. United States*, 526 U.S. 808 (1999) the Supreme Court considered the Continuing Criminal Enterprise statute (CCE) (21 U.S.C. §448). CCE is an "enterprise" statute similar to, and contemporaneous with RICO. It forbids

---

[17] *Bradley, First Amendment*, supra n. 3 at p. 140, quoting *United States v. Enmons*, 410 U.S. 396, 406, n. 16 (1973).

[18] According to LaFave and Scott, *Substantive Criminal Law* (Vol. II p. 460, 1986) the only such states are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming, though some other states may simply call extortion "criminal coercion." *See Bradley, First Amendment*, supra n. 3 at fn. 82.

"any person" from "engaging in a continuing criminal enterprise." involving a "series of violations" of drug statutes. 21 U.S.C. §848(a) and (c). To find a violation of this statute, the Court held, "a jury . . . must unanimously agree, not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" 526 U.S. at 815.

Likewise, RICO requires proof of a "pattern of racketeering activities." Thus, applying *Richardson*, the jury verdict must specify precisely which of the many acts mentioned at the trial were the predicate acts of extortion that constituted the RICO pattern. But the charge to the jury required no such proof.[19] Indeed, as noted above, the judge, over defense objection, flatly refused to require such a finding by the jury. Nor did the jury verdict specify which of the various acts of extortion that they found constituted the "pattern."[20] This is particularly crucial under RICO because, without knowing what conduct constituted the "21 acts of extortion under federal law" and "25 acts under state law" found by the jury, it is impossible to tell whether these crimes constituted the necessary "pattern," whether the enterprise was conducted "through" those crimes or even which defendant committed, and which "enterprise" was conducted, through all these crimes.

When the acts in question are part of a political protest, this defect is even more acute, as *Claiborne Hardware* makes clear. The jury's finding of 21 acts of extortion under federal and 25 under state law must be specific. That is, the verdict must state which defendant committed which act of violence. The failure to be specific shows that the jury, like the complaint, did not carefully consider which acts were

---

[19] Transcript at pp. 4943-48.

[20] Verdict Form p. 29.

committed by these petitioners and which acts may have been committed by other anti-abortion activists. Nor, it appears, did the jury separate acts and threats of violence, for which damages may be awarded, from acts or threats of barricading and political demonstration, for which damages are inappropriate. There simply are not 25 acts that are even arguably "acts or threats of violence," or 21 acts that are arguably Hobbs Act violations, proved in this case. Had such lawsuits been allowed to proceed in the 1960's, they would have shut down the civil rights movement.

CONCLUSION

In conclusion, respondent has made out violations of the FACE statute and state trespassing laws, and enforcement of these laws should be adequate to allow abortion clinics to operate effectively. It is not generally necessary to invoke the stringent provisions of RICO, which were designed to put criminal enterprises out of business, against anti-abortion protesters, animal rights protesters, or other political activists. In order to do so, plaintiffs would have to show that a particular anti-abortion, or other "enterprise," was operated through a "pattern of racketeering activities," in this case extortion. But respondent has failed to do this. It has not proved extortion in that specific acts of violence or threats of violence aimed at the obtainment of property were neither proved, nor specified by the jury. It has not attributed particular acts or threats of violence to particular petitioners, nor has it shown a "pattern" as required by RICO. Finally, applying RICO to this case, without attributing damages to specific acts or threats of violence by named petitioners, violates the First Amendment, as does the imposition of treble damages and counsel fees. In order for PETA to effectively engage in political protest to protect the rights of animals, we respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

JEFFREY S. KERR
General Counsel
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.
501 Front Street
Norfolk, VA 23510
(757) 622-7382

CRAIG M. BRADLEY *
James L. Calamaras
Professor of Law
INDIANA UNIVERSITY SCHOOL OF LAW
Bloomington, IN 47405
(812) 855-1257

* Counsel of Record

MOTION FILED
MAR - 4 2002

(40) (35)

Nos. 01-1118, 01-1119

In The

Supreme Court of the United States

Joseph Scheidler, et al.,

Petitioners,

v.

National Organization for Women, Inc., et al.,

Respondents.

Operation Rescue,

Petitioners,

v.

National Organization for Women, Inc., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Motion of Life Legal Defense Foundation to File Brief as Amicus Curiae and Brief in Support of Petitioners

Catherine W. Short
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

Andrew W. Zepeda*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

**Counsel of Record*

Attorneys for Amicus

25 pp

Motion For Leave To File Amicus Curiae Brief
In Support Of Petitions For Certiorari

Life Legal Defense Foundation, a California non-profit corporation, hereby moves for leave of this Court to file an amicus curiae brief in support of petitions for certiorari filed by Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc., and Petitioner Operation Rescue. All petitioners have consented to Life Legal Defense Foundation's request to file an amicus curiae brief. Respondents, however, have withheld consent, claiming without having seen any amicus brief that it would address issues beyond those raised by the petitions.

As its name suggests, Life Legal Defense Foundation (LLDF) provides legal assistance to pro-life advocates most often to ensure respect for their lawful First Amendment-protected activities, including public protest, leafleting, counseling and picketing near abortion facilities. LLDF is especially concerned that this Court grant the petitions for certiorari and thereafter review and reverse a Seventh Circuit decision which otherwise threatens thousands of social activists with the specter of civil R.I.C.O. liability including treble damages and nationwide injunctions for their exercise of free speech and assembly rights. Particularly alarming to LLDF is the failure of the trial court and the Seventh Circuit to take steps to ensure the trial judge's injunction order satisfied the rigorous standards of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Petitioners have addressed at length the failure of the trial court to ensure the jury verdict did not impose civil liability for damages based on guilt by association and that the scope of relief be closely tailored to the unprotected conduct. But these same failings are present in the trial court's injunction order. The holding in *Claiborne*, of course, is not limited to damage claims but applies equally to injunctive relief.

The trial court's and Seventh Circuit's inattention to the *Claiborne* standards has resulted in the issuance of a permanent injunction of nationwide reach which purports to reach to individuals

acting "in concert" with Petitioners who violate the injunction without Petitioners' inducement, direction, or involvement. Not only does such a holding offend *Claiborne*, but it conflicts with the repeated rulings of this Court holding that no court has the power to enjoin the acts of non-parties to an *in personam* proceeding unless such persons knowingly and purposefully aid and abet a named party to violate the injunction.

Also of concern to LLDF is the trial court and Seventh Circuit's failure to observe *Claiborne*'s requirement that the relief afforded be narrowly tailored to address unprotected conduct rather than "non-violent, protected activity."

LLDF fears that the Seventh Circuit's remarkably loose interpretation of the Hobbs Act will be used to silence the pro-life movement and other social protest groups.

Life Legal Defense Foundation, therefore, respectfully requests that it be granted leave to file the following brief as *amicus curiae* in support of the petitions for certiorari.

Respectfully submitted,

CATHERINE W. SHORT
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

ANDREW W. ZEPEDA*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

**Counsel of Record*

Attorneys for Amicus

TABLE OF CONTENTS

Page

Table of Authorities ii

Interests of Amicus 1

I. The Nationwide Private R.I.C.O. Injunction Affirmed By The Seventh Circuit Creates Intolerable Conflicts And Will Invite Forum-Shopping ..... ??

II. The Injunctive Relief Does Not Satisfy The Exacting Standards Of *NAACP v. Claiborne Hardware Co.* And The Lower Court's Decision Conflicts With The Decisions Of This Court And Other Circuits On The Binding Effect Of Injunctions On Non-Parties ..... ??

III. The Seventh Circuit's Cavalier Reading Of R.I.C.O. To Permit Imposition Of A "Nationwide Injunction" On Behalf Of Private Plaintiffs Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts ..... ??

IV. Conclusion ..... ??

TABLE OF AUTHORITIES

CASES:

Page

Alemite Manufacturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) 7, 8

Arcadia Women's Health Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991) 12

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993). 12, 15

Chase National Bank v. City of Norwalk, 291 U.S. 431, 436-37 (1934) 7

Dym v. White, (San Diego Super. Ct. No. 670970) 11

EDP v. Vargovcik, et. al., (L.A. Super. Ct. No. BC 092929) 11

Feminist Women's Health Center v. Blythe, 32 Cal.App. 4th 1641 (1995), 116 S.Ct. 514 (1995) 11

Foti v. Planned Parenthood (San Mateo Super. Ct. No. 405649) 11

G.&C. Merriam Co. v. Webster Dictionary Co. Inc., 639 F.2d 29, 35 (1st Cir. 1980) 9

Herrlein v. Kanakis, 526 F.2d 252, 254 (7th Cir. 1975) 9

Kenneally v. Operation Rescue, (L.A. Super. Ct. No. BC 075178) 11

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) 12

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 6, 7, 10, 16

National Abortion Federation v. Operation Rescue, 721 F.Supp. 1168 (C.D.Cal. 1989) 11, 15

TABLE OF AUTHORITIES—Continued

Page

National Abortion Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) 11, 13, 14, 15, 16

National Organization for Women v. Operation Rescue, 726 F.Supp. 300 (D.D.C. 1989) 12

National Organization for Women v. Operation Rescue, 726 F.Supp. 1483 (E.D.Va. 1989) 12

National Organization for Women v. Operation Rescue, 747 F.Supp. 760 (D.D.C. 1990) 12

National Organization for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990) 12

New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989), 110 S.Ct. 2206 (1990) 12

NOW v. Scheidler, 267 F.3d 687 (7th Circuit, 2001) 2, 4

People v. Operation Rescue National, et al., 80 F.3d 64 (2d Cir. 1996) 8

Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church, 765 F.Supp. 617 (N.D. Cal.) 11

Planned Parenthood Ass'n of San Mateo County v. Operation Rescue, 50 Cal. App.4th 290 (1996) 2, 11

Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus, 14 Cal. App. 4th 162 (1993) 11

Planned Parenthood League of Massachusetts v. Operation Rescue, 406 Mass. 701, 550 N.E.2d 1361 (1990) 11

Planned Parenthood of San Diego and Riverside Counties v. Wilson, 234 Cal.App. 3d 1662 (1991) 11

TABLE OF AUTHORITIES—Continued

Page

Planned Parenthood Shasta-Diablo, Inc. v. Operation Rescue (Butte County Super. Ct. No. 115924) 11

Planned Parenthood Shasta-Diablo, Inc. v. Williams, 10 Cal.4th 1009 (1995) 11

Redding Feminist Women's Health Center v. Operation Rescue (Shasta County Super. Ct. No. 112314) 11

Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945) 7

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) 3

Roe v. Operation Rescue, 710 F.Supp. 577 (E.D. Pa. 1989), 919 F.2d 857 (3d Cir. 1990) 11

Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue, 744 F.Supp. 230 (D.Nev. 1989) 11

United Pharmacal Corp. v. U.S., 306 F.2d 515 (1st. Cir. 1962) 9

U.S. v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998) 8

U.S. v. Local 30, United Slate, Tile and Composition Roofers, et al., 871 F.2d 401 (3d Cir. 1989) 6

U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 995 F.2d 375 (2d Cir. 1993) 5

Volunteer Medical Clinic v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) 11

Wilkerson, et al. v. Scott, et al. (San Diego Super. Ct. No. 728883) 11

Women's Health Care Services, P.A. v. Operation Rescue—National, 773 F.Supp. 258 (D.Kan. 1991) 12

TABLE OF AUTHORITIES—Continued

Page

Women's Health Care Services, P.A. v. Operation Rescue—National, 24 F.3d 107 (10th Cir. 1994) 12

Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969) 7

Statutory Provisions:

18 U.S.C. § 1962 5

18 U.S.C. § 1962(a) 4

18 U.S.C. § 1962(b) 4

18 U.S.C. § 1962(c) 4

18 U.S.C. § 1962(d) 4, 5

18 U.S.C. § 1964(a) 4

42 U.S.C. § 1985(3) 15

Hobbs Act 5

Fed.R.Civ.P. 65(d) 7

Interests Of Amicus

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By 1991, most of these pro-life advocates had turned to other entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at appropriate locations, including abortion facilities. Rather than applauding this conversion to lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '8os and the lawful protest of the '9os. They consider both to be unlawful interference with, and harassment of, women seeking abortions. The only difference is that the civil disobedience of the '8os occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily—and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, in the early to mid-'9os, many abortion providers sought injunctions against pro-life picketers. *See infra*, Section III.

The abortion providers soon realized that the most effective way to seek injunctive relief was to invoke the name "Operation Rescue", a group notorious for civil disobedience and "rescues" in the '8os. One or two "rescues" in an abortion facility's or a defendant's past was frequently the key to obtaining an injunction

restricting lawful picketing.[1] To this day, abortion providers and supporters gather and maintain data on who is "associated" with Operation Rescue, meaning who of today's peaceful picketers participated in a blockade or went to an Operation Rescue rally ten years ago.

Amicus LLDF fears that the nationwide R.I.C.O. injunction issued in *NOW v. Scheidler* or to be issued by courts emboldened by the Seventh Circuit's affirmance in that case will be used, or abused, by abortion providers to intimidate pro-life speakers because of their past participation with Operation Rescue[2] or Pro-Life Action Network ("PLAN"), or to intimidate them from future involvement with these groups, or even groups that associate with these groups, in completely lawful First Amendment protected activities. Involvement in *lawful* protest activities with any "Operation Rescue" entity, at abortion facilities or elsewhere, might be deemed sufficient to bring someone within the scope of the injunction. Thus, not only the "rescuer" from days gone by, but the person who, for example, lawfully distributes leaflets at a school in conjunction with Operation Rescue or PLAN today may find herself subject to the jurisdiction of the United States District Court for the Northern District of Illinois or any other court which issues a nationwide injunction under R.I.C.O. to private litigants. LLDF is gravely concerned that "guilt by association" will be the rule of the day in courts bound to or inclined to follow the Seventh Circuit. Leaders of pro-life organizations (or any social movement for that matter) lawfully engaged in social protest will be silenced for fear they will be held liable if any

[1] See, e.g., *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal.App. 4th 290 (1996), cert. denied, 522 U.S. 811.

[2] Respondents apparently intend just such a result: "In addition to the co-conspirators listed in Exhibit B, there are hundreds or thousands of unidentified co-conspirators who have joined forces with the R.I.C.O. defendants to commit racketeering activity aimed at closing clinics that perform abortions." Plaintiff's Amended R.I.C.O. Case Statement, S. App. 378, 381. In Respondents' view, co-conspirators also include anyone who attended a PLAN meeting and then committed an illegal act in furtherance of the conspiracy. Tr. 2237:25-2238:22.

of their followers engage in independent acts which go beyond lawful protest.

I. The Nationwide Private R.I.C.O. Injunction Affirmed By The Seventh Circuit Creates Intolerable Conflicts And Will Invite Forum-Shopping

As discussed at length in the petitions of the parties, the Seventh Circuit decision permitting private civil litigants to obtain injunctive relief under R.I.C.O. directly conflicts with that of the Ninth Circuit in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The Ninth Circuit conducted a thorough examination of the text and legislative history of R.I.C.O. and determined that the remedy available to private plaintiffs was limited to treble damages. This decision has been followed in subsequent Ninth Circuit cases, as well as in cases in other circuits. See Petition for Writ of Certiorari, No. 01-1119, at 11, n. 17.

Although the Ninth Circuit has decided that private injunctive relief is not available under R.I.C.O., the Seventh Circuit's decision affirms a private R.I.C.O. injunction which purports to be operative throughout the country, including the Ninth Circuit. Worse than a mere conflict among circuits, the nationwide reach of the private injunction creates an intolerable scenario: although a plaintiff could never obtain such relief in the Ninth Circuit, a plaintiff who obtains his private R.I.C.O. injunction in a district court in the Seventh Circuit can enforce it against defendants and those acting in concert for acts and omissions within the Ninth Circuit. The confusion created by this situation will be increased when the plaintiffs or any "federal, state, or local law enforcement authority" seek to enforce the injunction in district courts within the Ninth Circuit, as permitted in the terms of the injunction itself.

Thus, there is a particularly pressing need for this Court to resolve this conflict. A decision is necessary not only to provide uniformity in the application of the law, but to prevent the forum

shopping and confusion which will necessarily ensue if R.I.C.O. plaintiffs are allowed to obtain injunctive relief in one circuit which will be effective in another circuit in whose courts private R.I.C.O. injunctive relief is held to be beyond the jurisdiction of the court to grant.

This Court and other courts have long complained about private litigants' manipulation of R.I.C.O. to work the intimidation the heavy hammer of treble damages and attorneys' fees can provide. This Court and many appellate courts have had to cope with the virtually unlimited creativity of lawyers in transforming garden variety business conflicts into complex civil R.I.C.O. actions. One can only imagine what private litigants and their attorneys will plead if they believe they can transcend the jurisdictional bounds of state courts' equity powers and obtain a *nationwide* injunction and a right to recover attorneys' fees to boot.

The permanent R.I.C.O. injunction issued in *NOW v. Scheidler* involves more of the same stretching of R.I.C.O. far beyond Congress' intent. Not surprisingly, the R.I.C.O. injunction issued exceeds the relief allowable under R.I.C.O. That injunction does not enjoin R.I.C.O. violations. Rather it enjoins the commission of predicate offense which any state court could do as well but for the jurisdictional limits posed by state lines.

The jurisdiction afforded to district courts under R.I.C.O. is limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operating any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of the

predicate offenses which may give rise to a "pattern of racketeering activity" is not prohibited by R.I.C.O. since the predicate offenses are crimes in themselves.

Hence a district court's authority to issue injunctive relief under R.I.C.O. is limited to the prevention of R.I.C.O. violations, i.e., violations of section 1962. Injunctive relief is not authorized under R.I.C.O. merely to prevent the commission of predicate offenses, since state courts are presumably capable of enjoining the commission of crimes. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under R.I.C.O. include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Except for the boilerplate prohibition on "operating an enterprise," the instant injunction does not prevent and restrain R.I.C.O. violations, i.e., violations of section 1962, but instead purports to enjoin the commission of acts which Respondents contend constitute predicate offenses, namely, violations of the Hobbs Act. If the injunction were intended to prevent or restrain R.I.C.O. violations it must necessarily identify the "enterprise" which is the subject of the R.I.C.O. violation. The instant injunction is not a legitimate exercise of authority under R.I.C.O. but instead appears to use vague R.I.C.O. terminology to obtain a nationwide injunction to restrain conduct which a state court already has the power to do. Cf. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (Enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members

and associates of organized crime for any commercial purpose was within scope of R.I.C.O.'s civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers, et al.*, 871 F.2d 401 (3d Cir. 1989) cert. denied, 493 U.S. 953 (1990) (Individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

The prohibition on "operating an enterprise," central to the maintenance of federal court jurisdiction, cannot be treated as a superfluity or "boilerplate." It should have been carefully and explicitly defined to ensure those charged, or who may be charged, with responsibility to comply understand what is—and is not—prohibited.

To allow the Seventh Circuit's decision to go unreviewed will result in a major conflict among the circuits and encourage plaintiffs to contrive a civil R.I.C.O. violation to obtain federal jurisdiction and obtain a nationwide injunction which enjoins nothing more than the commission of predicate offenses, e.g., violations of state and federal crimes, which any state court could do in equity.

II. The Injunctive Relief Does Not Satisfy The Exacting Standards Of *NAACP v. Claiborne Hardware Co.* And The Lower Court's Decision Conflicts With The Decisions Of This Court And Other Circuits On The Binding Effect Of Injunctions On Non-Parties

As Petitioners note, the Seventh Circuit's holding is inconsistent in several ways with this Court's unanimous decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Though *Claiborne* involved an award of damages, this Court's holding in *Claiborne* was not limited to damages analysis. Rather, the Court in *Claiborne* looked foremost to the imposition of liability. Damages are only one form of remedy for liability. Injunctive relief is another. This Court expressly noted in *Claiborne* that the same exacting standards it insisted be applied to any trier of facts' imposition of liability and awarding of damages are applicable to the trier of fact's determination of liability and injunctive relief. *Id.* at 924, n. 67.

Thus, Petitioners' complaint that the Seventh Circuit failed to observe the *Claiborne* holding in its affirmance of liability and treble damages, applies as well to the Seventh Circuit's affirmance of the permanent injunction. The same defects in the jury instructions which did not require any linking of the Petitioners with the commission of predicate acts by others associated with PLAN, for example, are present in the trial court's order issuing the permanent injunction.

The Seventh Circuit's nonchalance about the very real possibility that the jury viewed the instructions as an invitation to find guilt by association is manifest in the Seventh Circuit's interpretation of the breadth of the permanent injunction to restrain the independent acts of non-parties who belong to the same association as did the Respondents.

It is settled law that a court has no power to enjoin acts of non-parties to an *in personam* proceeding, except where such persons are knowingly and purposefully aiding and abetting a named party to violate the injunction. Fed.R.Civ.P. 65(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934) (reversing order which "assumed to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (courts may not grant an injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"; principle of applying injunctions to nonparties is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"); *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 112 (1969) (reversing post-judgment entry of injunction against non-party who was not shown to be in concert or participation with named parties); *Alemite Manu-*

facturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.); *U.S. v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In stark contrast, however, the Seventh Circuit interpreted the reach of the district court's injunction to encompass the independent acts of non-parties: "If individuals acting in concert with the defendants or PLAN violate the injunction, ***without inducement or direction by the defendants***, the violators, ***not the defendants***, would be in contempt of the court's order." Appendix to Brief of Petitioner Operation Rescue at 31a (emphasis added).

The Seventh Circuit thus created a previously unheard-of category of potential contemnors, i.e., persons closely associated enough with the defendants to be bound by the terms of the injunction, but not so closely associated as to be acting with the "inducement or direction" of the defendants. Such a category is a legal and logical impossibility:

> "[T]he only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, ***but what it has the power to forbid, the act of a party***. This means that the respondent must either abet the defendant, or must be legally identified with him."

Alemite, *supra*, 42 F.2d at 833 (emphasis added). More recently, in an abortion protest case, the Second Circuit citing *Alemite* held:

> In order for a court to hold a nonparty respondent in contempt of a court order, '***the respondent must either abet [the party named in the order], or must be legally identified with him.***' [citation omitted.]. . . . An injunction issued against a corporation or association binds the agents of that organization ***to the extent they are acting on behalf of the organization***. [citation omitted.] Generally, persons who cease to act in one of the designated capacities are no longer bound by the decree."

People v. Operation Rescue National, et al., 80 F.3d 64, 70 (2d Cir. 1996) (emphasis added).

The Seventh Circuit's holding that non-parties could be held in contempt without the defendants also being held in contempt conflicts with long-established case law on the subject of non-party contemnors: "[A] key principle in cases binding a nonparty who is not legally identified with a party is that a person properly named in the injunction must have had a material role in the subsequent violation of that injunction." *G.&C. Merriam Co. v. Webster Dictionary Co. Inc.*, 639 F.2d 29, 35 (1st Cir. 1980). *See also United Pharmacal Corp. v. U.S.*, 306 F.2d 515, 517-18 (1st. Cir. 1962) ("if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated"); *Herrlein v. Kanakis*, 526 F.2d 252, 254 (7th Cir. 1975) ("Since neither [named party] was found in violation of the order, [non-party] cannot be held liable as an aidor or abettor of the named parties in violating the injunction").

This element of third-party liability, i.e., the required joint liability of an enjoined party for any contemptuous act, acted as a brake on an overly expansive interpretation of "acting in concert." By disposing of this element, the Seventh Circuit has redefined the phrase "acting in concert" to mean mere association with an enjoined party, or, more simply put, guilt by association. The injunction is thus loosed from its moorings of prohibiting unlawful racketeering-related acts by the named defendants, and becomes instead a means of intimidating individuals from associating with the enjoined parties (which include organizations of alleged nationwide reach, according to the plaintiffs) in *any* activity, lest they come under the jurisdiction of the court as persons "acting in concert" with the parties.

The Seventh Circuit evidently did not consider the chilling effect on the exercise of legitimate acts of protest created by the fact that "prosecutorial discretion" for enforcement of the district court's order rests in the hands of bitterly opposed ideological opponents. These opponents may enforce the injunction themselves through civil contempt proceedings in the district court,

compelling anyone in the country to appear in the District Court for the Northern District of Illinois. All that is necessary to establish the personal jurisdiction of the court is for the plaintiffs to serve that individual with an order to show cause and *allege* that the individual is "in concert" with PLAN or one of the named defendants through mere association.

By affirming the order of injunction, the Seventh Circuit failed to restrain the impermissible reach of the injunction's power over innumerable individuals and organizations not before the court. LLDF's concerns about application of the injunction to these persons cannot be swept aside with the axiom that, as long as one obeys the law, one has nothing to worry about. Compelling or even threatening to compel an individual to defend himself or herself in a distant jurisdiction is itself a burden on freedom of expression and association.

The Seventh Circuit's holding that a nonparty may be bound by the injunction by mere association with named parties creates a conflict with the decisions of this Court and other circuits which by itself warrants the granting of the petition for certiorari. That holding highlights the Seventh Circuit's inattention to the exacting requirements of *Claiborne*.

III. The Seventh Circuit's Cavalier Reading Of R.I.C.O. To Permit Imposition Of A "Nationwide Injunction" On Behalf Of Private Plaintiffs Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts

Petitioners are not the first parties to have been awarded injunctive relief against abortion protests. Rather, their only claim to distinction is the length of time it took them to secure an injunction. During the thirteen years this action was pending in the District Court, scores of injunctions involving anti-abortion protesters have been issued by state and federal courts in other jurisdictions.

Amicus is aware of over 30 actions filed in California alone since 1985, all seeking injunctive relief against anti-abortion protests. In some of these actions, the plaintiff abortion providers were completely or partially successful.[3] In other actions, they failed to obtain relief and the action was dismissed.[4] At least two injunction actions are pending at this time in California.[5]

Many of these actions, both within and without California, included "Operation Rescue" as a defendant.[6] Outside California: *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989), aff'd in part and rev'd in part, 919 F.2d 857 (3d Cir. 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F.Supp. 230 (D.Nev. 1989); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991);

---

[3] See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal.4th 1009 (1995) cert. denied, 117 S.Ct. 1285 (1997); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal.App. 3d 1662 (1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal. App.4th 290 (1996) cert. denied, 522 U.S. 811 (1997).

[4] See, e.g., *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue, et al.*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *EDP v. Vargovcik, et. al.*, (L.A. Super. Ct. No. BC 092929) (filed 11/93).

[5] *Wilkerson, et al. v. Scott, et al.* (San Diego Super. Ct. No. 728883) (filed 3/99); *Foti v. Planned Parenthood* (San Mateo Super. Ct. No. 405649) (cross-complaint filed 9/98).

[6] Inside California: *Feminist Women's Health Center v. Blythe*, 32 Cal.App. 4th 1641 (1995) cert. denied, 116 S.Ct. 514 (1995); *National Abortion Federation v. Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) rev'd 8 F.3d 680 (9th Cir. 1993); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F.Supp. 617 (N.D. Cal.); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal. App.4th 290 (1996) cert. denied 522 U.S. 811 (1997); *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *Dym v. White*, (San Diego Super. Ct. No. 670970) (filed 11/93); *Redding Feminist Women's Health Center v. Operation Rescue* (Shasta County Super. Ct. No. 112314) (filed 11/94).

Arcadia Women's Health Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991); *Women's Health Care Services, P.A. v. Operation Rescue—National*, 773 F.Supp. 258 (D.Kan. 1991), aff'd in part and rev'd and remanded in part, 24 F.3d 107 (10th Cir. 1994); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *National Organization for Women v. Operation Rescue*, 726 F.Supp. 300 (D.D.C. 1989), 747 F.Supp. 760 (D.D.C. 1990); *National Organization for Women v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va. 1989), aff'd 914 F.2d 582 (4th Cir. 1990) (per curiam), reversed sub nom. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). In the instant case, Respondents strenuously rejected any attempt by defendants to distinguish between various entities or associations bearing the name "Operation Rescue," instead insisting that all such organizations were subsumed in the one defendant Operation Rescue. See, e.g., Tr. at 1296:14-1298:21; 1299:23-1300:5; 3152-3155. The Permanent Injunction issued by the court names "Operation Rescue, a/k/a Operation Rescue National" as the enjoined party. Appendix to Brief of Petitioner Operation Rescue at 270a. Assuming *arguendo* that all anti-abortion entities bearing the name "Operation Rescue" are indeed one and the same, then the same defendant sued in this action by the class of "all women's health centers in the United States which perform abortions" has over the past decade been repeatedly sued by individual women's health centers in numerous other actions.[7] These actions all arose out of the same conduct or course of conduct which was the subject of the lengthy litigation in the instant case.

[7] Because the lower court in the instant action placed under permanent seal the names of the clinics which were included in and which opted out of this class action, Amicus has no way of knowing how many of the clinics in these subsequent lawsuits are also included in the Clinic Class. However, as Respondents represented to the court that only 11 clinics had opted out, it is clear that many of these clinics which sued Operation Rescue individually were also part of the Clinic Class in this action.

The most intriguing example of the abortion provider's "two bites at the apple" approach is the case of *National Abortion Federation, et al. v. Operation Rescue, et. al.*, No. CV 89-1181 (AWT) (C.D. Cal.) (filed 3/1/89) (hereinafter "*NAF v. OR*"). In that case, plaintiffs included not only the National Abortion Federation (representing its 48 member clinics in the state of California) but thirteen other California abortion providers or affiliates of California abortion providers.

In *NAF v. OR*, plaintiffs proposed the certification of two classes: 1) all women who seek medical care from family planning and abortion service providers and are deprived of that care by defendants' actions, and 2) all family planning clinics, abortion and other gynecological care providers and women's clinics which are unable to provide care because of the defendants' action. Complaint, ¶22.[8] Included among the defendants was "Operation Rescue," identified as "an unincorporated association with office in Binghamton, New York and Garden Grove, California." *Id.*, ¶ 28. Plaintiffs subsequently named Randall Terry as Doe 1, *Id.* at ¶ 33.

The most specific allegations in the complaint dealt with two blockades occurring in Los Angeles on February 11, 1989, at the Westside Women's Medical Clinic and the Pico Women's Medical Clinic. Complaint, ¶¶ 41-45. This is the very same blockade about which Respondents presented extensive testimony at the trial in the instant matter. Tr. 1329-1366; 1514-1526.[9] Indeed, one of the class representative plaintiffs in *NAF v. OR*, Carolyn Thompson, is none other than the witness who testified as the plaintiffs-Appellees' Third Anonymous Witness in the instant action.[10]

[8] For the convenience of the Court all the pleadings and orders in *NAF v. OR* referenced in this brief have been lodged with the Court.

[9] See Tr. at 1515 for identification of date and location of the incident.

[10] See Complaint ¶45: "One woman, who was scheduled for a post-operative appointment for follow-up examination following a hospitalized abdominal surgery, had to be treated on an emergency basis at an alternative location. Although this

On March 2, 1989, plaintiffs NAF, et al., moved for and were granted a temporary restraining order prohibiting trespass, blocking, and physically abusing persons entering or leaving abortion facilities. *See* Temporary Restraining Order.

Plaintiffs NAF, et al., subsequently filed a motion for contempt findings against several individuals, including Defendant Joseph Scheidler and various individuals associated with Operation Rescue, based in part on a blockade which occurred in at the Chico Feminist Women's Health Center on March 11, 1989. On March 13, 1989, the plaintiffs filed declarations from Dido Hasper and Penny Bertsch which stated that hundreds of copies of the federal temporary restraining order were served on participants in the blockade. *See* Supplemental Exhibits in Support of Request for Civil Contempt Fines.

In the instant case, Respondents called these same two witnesses, Dido Hasper and Penny Bertsch, to testify about this same blockade. These witnesses never mentioned in their testimony that a federal temporary restraining order (obtained in *NAF v. OR*) was served on all participants at the March 11 blockade. In fact, in response to a question from defense counsel about whether they had already filed a lawsuit (*NAF v. OR*) to get an injunction against that protest, Ms. Hasper testified: "No. We had filed—an attorney for us had filed a lawsuit to get an injunction against the regular protestors who were in front of the clinic. We had no idea that 500 or 400 people from Operation Rescue were going to drive up from Sacramento on that day. *So we had nothing against them.*" Tr. at 1429:25-1430:7 (emphasis added).

Chico Feminist Women's Health Center was already at the time of this incident a named plaintiff in *NAF v. OR*. Complaint

---

woman, plaintiff Carolyn Thompson, informed the blockaders that she was not pregnant and did not seek an abortion, defendants still prevented her from obtaining necessary medical care." Strangely, the *NAF v. OR* complaint, filed less than three weeks after the incident, does not contain any allegations of violence similar to which the Third Anonymous Witness testified to at trial in the instant matter. Tr. 1518-21.

¶ 8. It immediately sought an adjudication of contempt for violation of the court order issued in that case. Nonetheless, the district court in the instant action relied on evidence of this blockade as grounds, ten years later, for issuing further relief in the form of a nationwide injunction. *Id.* at ¶ 4.

On March 15, 1989, plaintiffs NAF et al. were granted a preliminary injunction. A copy of this injunction, which is still in effect, is lodged with the Court. See footnote 8 *supra*.

Before plaintiffs in *NAF v. OR* could move for certification of the classes, however, defendants moved to dismiss the case for failure to state a claim under 42 U.S.C. § 1985(3), plaintiffs' only federal claim. The court granted the motion with leave to amend, 721 F.Supp. 1168 (C.D.Cal. 1989), and, after plaintiffs' amendment, granted a subsequent motion to dismiss without leave to amend.[11] Plaintiffs appealed the dismissal, and sought and were granted a stay of the order dissolving the preliminary injunction, pending expedited appeal.

In 1993, the Ninth Circuit reversed the order dismissing the suit and remanded the case to the district court. *NAF v. OR* 8 F. 3d 680. Defendants filed a petition for rehearing, which was denied in 1994. The case was then remanded to the district court, where the preliminary injunction now continues to pend, no trial having ever been conducted.

Thus, for over 12 years, there has been and continues to be an enforceable federal court order enjoining Operation Rescue from trespass, blockades, and physical harm in the state of California. Two of the five incidents singled out for mention by the lower court in issuing the injunction in this case, Appendix to Brief of Petitioner Operation Rescue at 236a-257a, were also used as the basis for injunctive relief in *NAF v. OR*.

---

[11] The motion was granted on substantially the same grounds relied on by the U.S. Supreme Court four years later in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

The example of *NAF v. OR* highlights the inappropriate, duplicative nature of the "nationwide" injunction issued by the lower court. Not only is such broad relief unnecessary, but it unfairly subjects the defendants (and those "in concert" with them) to the threat of multiple contempt actions arising from the same incidents of allegedly contemptuous conduct, mirroring the redundant lawsuits to which the defendants have already been subjected.

It behooves this Court, therefore, to carefully review whether Congress when enacting R.I.C.O ever intended to afford private litigants the right to nationwide federal injunctions when the conduct they seek to enjoin could be sought in and granted by state courts, which also have the advantage of local perspective and proximity to the witnesses and parties traditionally required of equity courts.

Vesting federal courts with the power to issue nationwide injunctive relief will not only seriously alter the relationship of state and federal courts, it will result in conflicting, overlapping and duplicative injunctions and multiple contempt proceedings for single violations. This is especially pernicious where the injunctive relief impinges on the exercise of protected First Amendment rights.

Conclusion

The petitions for certiorari should be granted. The Seventh Circuit's decision creates intolerable conflicts among the circuits on fundamental jurisdictional issues. Worse, by ignoring *Claiborne*, the nationwide injunctive relief affirmed by the Seventh Circuit allows "in concert" liability for non-parties to be predicated on nothing more than guilt by association. To allow ideological adversaries the opportunity to invoke R.I.C.O. and obtain nationwide injunctions against leaders of social movements engaged in legitimate protest activity for their followers' independent and unprotected conduct will freeze, not merely chill, the exercise of First Amendment rights.

Respectfully submitted,

CATHERINE W. SHORT
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

ANDREW W. ZEPEDA*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

**Counsel of Record*

Attorneys for Amicus

(38)

No. 01-1118

FILED
MAR 8 2002
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETA'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Lowell E. Sachnoff
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Fay Clayton
Counsel of Record
Susan Valentine
Joyce A. Pollack
Robinson Curley & Clayton, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Attorneys for Respondents

---

4 pp

Rule 29.6 Statement

Respondents National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc. d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc. d/b/a Delaware Women's Health Organization do not have any parent corporations and do not issue stock to the public.

RESPONDENTS' OPPOSITION TO PETA'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Respondents declined to consent to Petitioners' *amicus curiae* PETA, and oppose PETA's motion for leave to file an *amicus curiae* brief. PETA fails to disclose to the Court that its counsel of record, Craig Bradley, was paid by the Scheidler Petitioners to write an *amicus* brief in Petitioners' support in the Seventh Circuit. The brief Mr. Bradley authored there is essentially the same brief he seeks leave to file here. Mr. Bradley has only slightly modified the brief paid for by the Scheidler Petitioners below -- the substance of the briefs is identical. Therefore, in essence the Scheidler Petitioners paid Mr. Bradley to write this brief and his brief is not that of an independent friend of the Court. For this reason, Respondents oppose PETA's motion.

Respectfully submitted,

Fay Clayton

Fay Clayton
Counsel of Record
Susan Valentine
Joyce A. Pollack
Robinson Curley & Clayton, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Lowell E. Sachnoff
Sachnoff & Weaver, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served a copy of **RESPONDENTS' OPPOSITION TO PETA'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***, on the parties shown on the attached Service List, by telecopier, by messenger delivery or by depositing same in the United States Mail, with proper postage prepaid, at 300 South Wacker Drive, Chicago, Illinois, as indicated, this 8th day of March, 2002.

✓ First Class Mail
___ Federal Express
___ Messenger Delivery
___ Telefax Delivery

Craig M. Bradley
James L. Calamaras Professor of Law
Indiana University School of Law
Bloomington, Indiana 47405
(812) 855-1257
Counsel for PETA

✓ First Class Mail
___ Federal Express
___ Messenger Delivery
___ Telefax Delivery

Jay Alan Sekulow
American Center for Law & Justice
205 Third Street, S.E.
Washington, D.C. 20003
(202) 546-8890
Counsel for Petitioner Operation Rescue

✓ First Class Mail
___ Federal Express
___ Messenger Delivery
___ Telefax Delivery

Alan Untereiner
Robbins, Russell, Englert,
Orseck & Untereiner, LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
Counsel for Petitioners Scheidler, et al.

Fay Clayton

Fay Clayton
Robinson Curley & Clayton, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for Respondents

Supreme Court, U.S.
FILED
MAR 12 2002

(31) (34)

Nos. 01-1118, 01-1119

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' OPPOSITION TO SEAMLESS GARMENT NETWORK'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Lowell E. Sachnoff
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Fay Clayton
Counsel of Record
Susan Valentine
Joyce A. Pollack
Robinson Curley & Clayton, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Attorneys for Respondents

6 pp

Rule 29.6 Statement

Respondents National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc. d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc. d/b/a Delaware Women's Health Organization do not have any parent corporations and do not issue stock to the public.

RESPONDENT'S OPPOSITION TO SEAMLESS GARMENT NETWORK'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE*

Respondents oppose the motion of the Seamless Garment Network, et al. ("Seamless Garment") for two reasons: (1) it raises issues not raised by the Petitioners; and (2) it contains serious misstatements of facts.

1. Although none of the Petitioners has challenged the scope of the injunction issued by the trial court, Seamless Garment attacks what it calls the injunction's "stunning breadth (nationwide) and its extended duration." Brief at 2. In fact, the time and geographic limitations of the injunction matched the time and geographic scope of the pattern of crimes of the enterprise, Pro-Life Action Network ("PLAN"), which operated nationwide for twelve years after this case was filed.

2. Seamless Garment misstates the facts about the individual Petitioners' non-violence. It states, at 6, that the acts of violence "were most emphatically not the acts of any of the named Petitioners, all of whom are committed exclusively to non-violent protest." The trial record belies this statement. In addition to extensive proof from Respondents' witnesses of the individual Petitioners' personal involvement in acts of force and violence, *e.g.*, T766-80, 1144-59, 1470-73, 2373-36, 2366-69, 4120-22, on cross-examination, even Petitioner Scheidler admitted personal involvement in violent actions like the Pensacola Ladies' Center invasion. (This is the clinic where his "choose life" card was used.[1]) Scheidler admitted to meeting with fellow PLAN members John Burt and Joan Andrews to plan the Pensacola invasion. They referred to this meeting, which was held the night before the invasion itself, as a "conspiracy."

---

[1] Seamless Garment errs in implying that Scheidler's "choose life" card was presented as a threat. Respondents never suggested the card was an act of extortion; it was put into evidence solely to prove Scheidler had personally visited that clinic and therefore the clinic administrator knew who he was.

T4021. At the meeting to plan the invasion, they discussed dismantling medical equipment, T4021; and they agreed on details of the invasion, such as how "a group of four to eight would enter the clinic through the waiting room and some would go in the back and either try to get in or block the door or block the entrances to the operating rooms," T4014. After Burt and Andrews were arrested and admitted they had "trashed that clinic," T4022, Scheidler boasted to other PLAN supporters about the violence he had personally orchestrated, saying, "Had a glorious time in Pensacola, FL last week – shut down an abortuary for a couple of days by dismantling the suction machine," PX670, and "You would have loved our action in Pensacola the week of March 25. Joan Andrews was superb and really put the old aborters out of business for a spell." PX674; T4025-26. In addition to the destruction of property at Pensacola, two clinic workers were sent to the hospital with serious injuries. T1470-73. Petitioner Scheidler also admitted teaching PLAN members to always "case the [clinic's] layout beforehand" to "make the clinic workers know that they are vulnerable." T3930. All of the individual Petitioners (and their organizations) participated in the planning and authorization of the use of force and violence, contrary to Seamless Garment's assertion.

3. As Seamless Garment recognizes, Respondents were prevented from introducing evidence of murder, arson, kidnapping and other crimes because the trial court conducted pre-trial *James* hearings ensuring that crimes by co-conspirators be tied directly to Petitioners; only evidence of crimes tied to the Petitioners was allowed into evidence, *e.g.*, T442-96. This fact undermines Seamless Garment's argument that "irrelevant" evidence was introduced, but this is another issue not raised in the Petitions and thus not properly before the Court.

4. Because Seamless Garment raises little but fact-based disputes that are unfaithful to the record, its brief is not helpful. The law in this area is clear; it was established in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *Claiborne* was carefully applied to the facts below by both the trial court and the court of appeals.

For the foregoing reasons, Respondents oppose Seamless Garment's motion.

Respectfully submitted,

Fay Clayton
Counsel of Record
Susan Valentine
Joyce A. Pollack
Robinson Curley & Clayton, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Lowell E. Sachnoff
Sachnoff & Weaver, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Attorneys for Respondents

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Nos. 01-1118, 01-1119

In The

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Appendix In Support of Brief of Amicus
Life Legal Defense Foundation
In Support of Petitioners

CATHERINE W. SHORT
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

ANDREW W. ZEPEDA*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Boulevard, Suite 800
Beverly Hills, California 90210-5533
(310) 274-8700

* *Counsel of Record*

Attorneys for Amicus

RECEIVED
MAR 19 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

63 pp

EXHIBIT A

APPENDIX A

CAROL A. SOBEL
JOHN HAGAR
PAUL L. HOFFMAN
TRACY RICE
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

BETTY WHEELER
ACLU FOUNDATION OF SAN DIEGO
AND IMPERIAL COUNTIES
1202 Kettner Boulevard, Suite 6200
San Diego, California 92101
(619) 232-2121

Additional Attorney for Plaintiffs
listed on next page

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION; CAROLYN THOMPSON; GAYLE BERRY; FAMILY PLANNING ASSOCIATES MEDICAL GROUP; FEDERATION OF FEMINIST WOMEN'S HEALTH CENTER; PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD OF SAN DIEGO; HER MEDICAL CLINIC; PASADENA PLANNED PARENTHOOD COMMITTEE, INC.; CARING WOMAN; CLINICA MEDICA PARA LA MUJER; DR. LEON SCHIMMEL; CALIFORNIA NOW; WOMANCARE, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES; HEALTH CARE CENTER FOR WOMEN; PICO WOMEN'S MEDICAL GROUP; FAMILY PLANNING MEDICAL CLINIC; and PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, Plaintiffs, vs. OPERATION RESCUE; JEFF WHITE; JOSEPH FOREMAN; DR. RANDY ADLER; KEN TANNER; RANDALL TERRY and JOHN AND JANE DOES 3 through 100, inclusive, Defendants.	CASE NO. CV 89-1181 AWT (Bx) FIRST AMENDED COMPLAINT (CLASS ACTION) (Civil Rights)

ADDITIONAL ATTORNEYS FOR PLAINTIFFS

PAUL PERSONS
1834 Arroyo Canyon
Chico, California 94928
(916) 893-4710

FIRST CAUSE OF ACTION

(Violation of 42 U.S.C. Section 1985(3))
(Violation of Right to Travel,
Right to Obtain Abortion)
(By all Plaintiffs Against all Defendants)

The plaintiffs, by their attorneys, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed arising out of actions directly threatening the health and safety of thousands of women seeking abortions or other gynecological and family planning services in clinics and other facilities in the state of California since mid-February, 1989. Plaintiffs, who include individual women who have been or believe they will be denied access to health care providers, organizations representing the affected women and a class of women's health care clinics and abortion providers throughout California, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide medical services, including pregnancy-testing, pre-natal care, cancer screening and abortions, to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and physical harassment of private physicians, family planning clinics and abortion providers within the several counties of the State of California, by defendant organizations and

Feb 06 00 06:52p P.03

individuals, and others acting in concert with them or on their behalf.

2. Defendants have expressed their intent to block access to medical offices, to obstruct the provision of abortion and all other gynecological and family planning services available at these facilities, and to intimidate, harass and otherwise restrain women attempting to use the services of the clinics. Defendants' actions built to a "National Holy Week of Rescue" to coincide with Easter weekend on March 22 to March 25, 1989, concentrated in Southern California, with preliminary "test runs" throughout the state. Defendants do not indicate which providers they will target, or when, in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions and other medical services provided in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

JURISDICTION AND VENUE

3. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. section 1331 in that plaintiffs allege violations of federal law. In addition, jurisdiction is proper under 42 U.S.C. section 1985(3), 28 U.S. 1343 and the doctrine of pendent jurisdiction.

4. Venue in this District is proper under 28 U.S.C. section 1391(b) because the claims arise here.

Feb 06 00 06:52p P.04

PARTIES

Plaintiffs

5. Plaintiff National Abortion Federation (NAF) is a not-for-profit corporation with offices in Washington, D.C. It is an organization made up primarily of abortion providers, with 48 member clinics located throughout the State of California. It sues on behalf of itself, its member clinics and their staffs and patients.

6. Plaintiffs Carolyn Thompson and Gayle Berry are women who were denied access to family planning services and gynecological care during the blockade on February 11, 1989 by defendants of access to two medical facilities providing these services to women in the Los Angeles area. Plaintiffs intend to continue to seek medical services at these facilities in the future. They sue on their own behalf and on behalf of all others similarly situated.

7. Plaintiff Family Planning Associates Medical Group is a health care provider with 21 clinics that provide abortions and other family planning and gynecological care in five separate counties of the state of California. It sues on behalf of itself, its staff, and its patients.

8. Plaintiff Federation of Feminist Women's Health Center is a women's health care provider with 7 clinics located throughout the state of California, including facilities in Los Angeles, Sacramento, Redding and Chico. It sues on behalf of itself, its member clinics, its staff and its patients.

9. Plaintiff HER Medical Clinic is a women's health care provider that provides abortions and other family planning and

gynecological care in Los Angeles, California. It sues on behalf of itself, its staff and its patients.

10. Plaintiff Pasadena Planned Parenthood Committee, Inc. is a health care provider that provides abortions and other family planning and gynecological care in the Pasadena area. It sues on behalf of itself, its staff and its patients.

11. Plaintiff Caring Woman is a health care provider that provides abortions and other family planning and gynecological care in West Hills, California. It sues on behalf of itself, its staff and its patients.

12. Plaintiff Clinica Medica Para La Mujer is a health care provider that provides abortions and other family planning and gynecological care in Van Nuys, California. It sues on behalf of itself, its staff and its patients.

13. Plaintiff, Dr. Leon Schimmel, is the medical director of Women's Health Associates, a health care provider that provides abortions and family planning and other gynecological care in Yolo County. He sues on behalf of himself, his staff, and his patients.

14. Plaintiff California NOW is a membership organization with offices in Sacramento and elsewhere throughout California. It sues on behalf of its members who include women who will need to use the medical care being denied by defendants' blockades. Additionally, plaintiffs are called upon to protect their members who are subject to defendants' tortious conduct.

15. Plaintiff WomanCare, Inc. is a women's health care provider, with one facility in San Diego and a second office in Los Angeles, that provide abortions and other gynecological services. It sues on behalf of itself, its staff and its patients.

16. Plaintiff Planned Parenthood of Santa Barbara, Ventura and San Luis Obispo Counties is a women's reproductive health care provider with five clinics, of which one in each of the three named counties provides abortion services. It sues on behalf of itself, its staff and its patients.

17. Plaintiff Health Care Center for Women is a women's health care provider in Sherman Oaks, California which provides abortions, family planning and other gynecological care to women. It sues on behalf of itself, its staff and its patients.

18. Plaintiff Pico Women's Medical Group provides full health care services to women. It sues on behalf of itself, its staff and its patients.

19. Plaintiff Family Planning Medical Clinic is a women's health care provider in El Monte, California which provides abortions, family planning services and gynecological care to women. It sues on behalf of itself, its staff and its patients.

20. Plaintiff Planned Parenthood of Orange and San Bernardino Counties is a women's reproductive health care provider with five clinics, of which one in each of the three named counties provides abortion services. It sues on behalf of itself, its staff and its patients.

Class Allegations

21. Individual plaintiffs bring this action on their own behalf and on behalf of all women in the State of California who are deprived of necessary medical care by defendants' actions and of the right to travel; on behalf of all family planning clinics and women's health clinics and their staff and patients who are

unable to provide or receive necessary medical services because of defendants' actions; and on behalf of all providers of abortion and family planning and other gynecological services and their patients in the State of California who are similarly unable to provide or receive necessary medical services because of defendants' actions, pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

22. Plaintiffs seek certification of two classes. The members of the first plaintiff class are all women who seek medical care from facilities which provide a full range of medical services, including family planning, abortion and gynecological service providers and are deprived of that care because of defendants' present and threatened actions. The members of the second class are all family planning clinics, abortion and other gynecological care providers, and women's clinics which are unable to provide that care because of defendants' present and threatened actions. Each member of each plaintiff class is subjected to the conditions and practices alleged herein.

23. The first proposed class is comprised of thousands of members. The population of this class is constantly changing and subject to constant fluctuation. Thus, the number of members in the class are so numerous, and change as the medical conditions of the class members change, to a degree as to make joinder impracticable. The second proposed class is comprised of several hundred members. The population of this class also fluctuates, as defendants target different health clinics and medical providers with the actions complained of herein. Thus, joinder is also impracticable for this second proposed class.

24. There are questions of law and fact common to all members of both classes; namely, whether the practices of defendants alleged herein violate the constitutional and statutory rights of the plaintiffs and their proposed classes.

25. The questions of law and fact are common to members of both classes and predominate over any questions affecting individual members. Neither the differences in individual class members' legal status nor other individual characteristics among the class members are relevant to the questions raised by the allegations herein.

26. The named plaintiffs' claims are typical of those of the members of the two classes whom they seek to represent. The defenses that defendants will raise are common to all members of the classes. Plaintiffs know of no conflict of interest among members of the class with regard to the issues of this case, nor do plaintiffs know of any interest which individual class members might have in controlling or maintaining separate actions. Plaintiffs will fairly and adequately represent the interests of the proposed class, as will the attorneys who represent them.

27. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, and the plaintiffs know of no difficulties likely to be encountered in the management of this case as a class action.

Defendants

28. Defendant "Operation Rescue" is an unincorporated association, with offices in Binghamton, New York and Garden Grove, California, whose members' purpose is to organize and coordinate

Feb 06 00 06:53p P.09

disruptions of abortion and family planning facilities, including three announced blockades scheduled for the greater Los Angeles area from March 22 to March 25, 1989, March 18, 1989 in San Diego and March 11, 1989 in Sacramento. The Operation's literature lists its address in New York as P.O. Box 1180, Binghamton, New York 13902, and its telephone number as (607)723-4012. Its literature lists its California address as P. O. Box 3354, Laguna Hills, Ca. 92653. Operation Rescue maintains an office at 12966 Euclid, Suite 217, Garden Grove, California 92643. Its telephone number is (714)638-4592. The Operation's literature also lists the following additional telephone numbers in the state of California: Big Valley Operation Rescue, (209)538-4824; Bay Area Operation Rescue, (408)984-SAFE; Central Valley Operation Rescue, (209)683-8921; and Project Rescue, (619)598-8848 in San Diego.

29. Defendant Jeff White, acting in concert with the other defendants and others unknown, is one of the organizers of the blockades scheduled for March 22 to March 25, 1989 in the Southern California area, March 18, 1989 in San Diego, and March 11, 1989 in Sacramento. He is the director of Operation Rescue in Northern California.

30. Defendant Joseph Foreman, acting in concert with the other defendants and others unknown, is one of the organizers of the blockades scheduled for March 22 to March 25, 1989 in the Southern California area, March 18, 1989 in San Diego and March 11, 1989 in Sacramento. In addition, defendant Foreman is the organizer of an announced "sidewalk counseling" training session of March 4, 1989 in the Southern California area. He is an

Feb 06 00 06:53p P.10

employee of Operation Rescue National Organization, presently assigned to California.

31. Defendant Dr. Randy Adler, acting in concert with the other defendants and others unknown, is one of the organizers of the blockages scheduled for March 18, 1989 and March 22 to March 25, 1989 in the Southern California area. He is the coordinator of the Southern California Pastor's Rescue and the pastor of the Stone Mountain Church in Laguna Hills, California.

32. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

33. Defendant Randall Terry, previously identified as DOE I, acting in concert with the other defendants and others unknown, is the national director of Operation Rescue. He is an organizer of the blockades in March and August in Southern California.

34. Defendant Ken Tanner, previously identified as DOE II, acting in concert with the other defendants and others unknown, was the Southern California Director of Operation Rescue through late April, 1989. He was and continues to be an organizer of blockades throughout the southern California area.

FACTS

35. The defendants, pursuant to a conspiracy that they have entitled "Operation Rescue," plan to obstruct and close down

facilities at which they believe abortions are performed in the Los Angeles/Orange County area from March 22 to March 25, 1989, in Sacramento on March 11, 1989, and in San Diego on March 18, 1989, by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, blocking the path of patients, staff and visitors, and otherwise physically disrupting and interfering with the operations of and access to the facilities.

36. The defendants do not accept the decisions of the United States Supreme Court and the California Supreme Court that the United States Constitution and the California Constitution guarantee and protect a woman's right to choose abortion and to carry out that decision, and they intend to interfere with the rights of all women attending the targeted clinics and providers to receive medical care in order to prevent some women from exercising the right to seek an abortion.

37. Defendants have announced that, in carrying out the Operation, they will be joined by approximately 2,000 people from various parts of the country.

38. Defendants' own published plans for the California Operation state explicitly that they intend to shut down the "abortuary" clinics in this state and, specifically, to prevent clinic employees or pregnant women from entering the clinics. Defendants' instructions to their co-conspirators acknowledge that they are likely to be arrested, and state that, even if the police make arrests and seek to disperse the crowd, demonstrators are to "skooch" together and keep the doorways blockaded.

39. Defendants have not publicly stated which clinics in California the Operation will target on March 11, 1989 in Sacramento, on March 18, 1989 in San Diego or on March 22 to March 25, 1989 in the Los Angeles/Orange County area, or which clinic will be the site of "sidewalk counseling" on March 4, 1989, or which clinics or other cities will be the sites of "test-runs." Defendants have stated that they intend to keep this aspect of the Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organization intends to help protect and guarantee women's access to the facilities during the course of the Operation, but is frustrated in its attempts to do so by defendants' refusal to identify the targeted facilities.

40. Plans for the Operation were first announced by defendant Randall Terry and certain other defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May, 1987. Ever since that time, certain of the defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions" throughout the state and country. Since July, 1988, defendants, and other acting in concert with them, have conducted at least fourteen (14) blockades of clinics throughout the state, at which they have prevented ingress or egress entirely into or from the facilities by sitting or standing in front of the entrances and exits and by chaining themselves and their automobiles to clinic property or to heavy objects which impeded the ability of local law enforcement to clear access to the health care facilities.

Feb 06 00 06:55p P.13

41. On February 11, 1989, defendants conducted a five-hour "field-training" blockade at the Pico Women's Medical Clinic and the Westside Women's Medical Clinic in Los Angeles, California. Plaintiffs are informed that certain of the defendants characterized this blockade as a test run for the end of March in Los Angeles.

42. During the test run in Los Angeles, all entrances to both clinics were blocked by defendants White and Foreman and certain other defendants, for approximately five hours.

43. Participants in the trespass action at the two clinics in Los Angeles, who came from various parts of the state of California and from areas out of state, began gathering at the First Foursquare Church of Long Beach at 6:00 p.m. on February 10, 1989. All participants in the Operation were required to attend that rally in order to learn the location of the Operation's target for February 11, 1989.

44. Participants in the trespass action at the two clinics in Los Angeles, began gathering at the clinics at approximately 7:00 a.m. on February 11, 1989 and remained until shortly after 12:00 noon, during which time a total of approximately 600 participants blocked all entrances to both of the clinics and prohibited clinic staff and patients from gaining access to the facilities.

45. Approximately 10 women would have been seen for medical services at the Westside Women's Medical Clinic on February 11, 1989 for the activities of defendants. Approximately 12 women would have been seen for medical services at the Pico Women's Medical Clinic but for the activities of defendants. As a result

Feb 06 00 06:55p P.14

of defendants' activities, no women who had appointments for that day were served at either location. One woman, who was scheduled for a post-operative appointment for follow-up examination following a hospitalized abdominal surgery had to be treated on an emergency basis at an alternative location. Although this woman, plaintiff Carolyn Thompson, informed the blockaders that she was not pregnant and did not seek an abortion, defendants still prevented her from obtaining necessary medical care. Similarly, Gayle Berry informed blockaders that she had an appointment for an annual cancer screening test. Defendants did not believe her and denied her access to her doctor's office.

46. Defendants intend to replicate the Los Angeles action each day of the California Operation, at various clinics and abortion providers' offices in Los Angeles and throughout the state. Defendants have announced a similar test run for San Diego prior to the Los Angeles "siege" on March 18, 1989, and for Sacramento on March 11, 1989. Defendants have also announced a "sidewalk counseling" training session on March 4, 1989 at a location to be disclosed in Southern California.

47. Certain of the defendants, and others acting in concert with them, previously demonstrated at a clinic operated by plaintiff Planned Parenthood of San Diego County on January 21, 1989. At that time, approximately 250 demonstrators gathered in front of the clinic. During the course of the demonstration, defendants informed the director of Planned Parenthood of San Diego County that they were from defendant Operation Rescue and that they would be back to the clinic. Six police officers were positioned at the main parking entrance to the clinic facilities on that date.

48. Since early March, defendants have conducted more than 9 blockades in the San Diego area. All women have been excluded from medical care during these blockades, including one woman who was seeking follow-up care to prevent a miscarriage. Although she informed defendants she did not seek an abortion and did not believe in abortion, they still prohibited her from seeking necessary medical care.

49. Since October, 1988, defendants have been blockading clinics in Santa Clara County. Approximately 500 demonstrators have been arrested in Sunnyvale, California. The most recent blockade of clinics in this area occurred unannounced on February 11, 1989 in conjunction with the blockade of two clinics in Los Angeles. Certain of the defendants, and others acting in concert with them, have chained themselves to the clinic property, to heavy objects which have impeded law enforcement removing them, and have chained their automobiles to clinic property to facilitate the blockade of clinics.

50. During the past several months, certain of the defendants have appeared outside the Women's Health Associates clinic in Davis and informed clinic staff that they would be bringing Operation Rescue to Yolo County and planned a blockade of the clinic operated by plaintiff Dr. Leon Schimmel. Defendants have not announced a specific date on which they will blockade this facility in an attempt to frustrate plaintiffs' abilities to keep the access to medical services at the clinic open and available to all of its patients.

51. Certain of the defendants, and others acting in concert with them, have engaged in the conduct described above, all of

which is intended to and will have the effect of denying or disrupting women's access to the targeted clinics, with the intended result that many women will have to delay their scheduled medical services. Any delay in the provision of health services relating to childbirth and abortion, or in the provision of certain other gynecological services, increases the health risks faced by the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business without illegal interference.

52. Plaintiffs have no adequate remedy at law in that monetary damages cannot fully recompense them for the threats and actual injury to their health and safety resulting from defendants' actions and the consequent delays in receiving or providing necessary medical services.

53. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking medical care at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. section 1985(3). Defendants are and continue to be motivated by three forms of invidiously discriminatory animus! First, defendants have exhibited a class-based animus against women, the threat of which has been felt by any woman seeking medical care. Second, defendants have exhibited a class-based animus against pregnant women, the threat of which has been felt by any woman seeking

pregnancy counseling information, pre-natal care, fertility treatments and a range of other gynecological medical services. Third, defendants have exhibited class-based animus against women whom defendants believe are seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all like medical facilities in the state of California.

54. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

SECOND CAUSE OF ACTION

(Violation of 42 U.S.C. Section 1985(3))
(Conspiracy to Frustrate and/or Hinder Law Enforcement)

55. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as though fully set forth herein.

56. Defendants conspired together with each other and other parties presently unknown for the purpose of preventing and/or hindering the constituted authorities of the state of California from giving or securing to all women within this state the equal protection of the laws. In particular, defendants have engaged in a deliberate course of conduct aimed at frustrating the equal protection of the laws for women's medical care providers and their patients.

57. On April 29, 1989, for example, during an Operation Rescue blockade of a medical facility in San Diego, several leaders

of Operation Rescue tied rope around their legs, binding the blockaders together so that police officers were required to cut the rope with scissors before those blockaders could be removed from the entrance to Dr. Rand's office. On June 10, 1989, during an Operation Rescue blockade in San Diego, three Operation Rescue participants threw themselves under a police van and held on to the underside of the vehicle to delay police in removing those already arrested. In Cypress on March 23, 1989, OR blockaders crawled under and in front of the police van to prevent demonstrators from being removed. On June 10, 1989, in La Mesa, California, blockaders chained doors shut to a hallway leading directly to a clinic, impeding police and patient access to the area, as well as creating a safety hazard to staff and patients who were inside the clinic at the time. During a "Minuteman" raid by OR in San Marcos on July 20, 1989, four blockaders locked themselves together at the neck with interlocking solid bicycle locks in a deliberate attempt to frustrate police efforts to remove them from the doctor's office. In other instances throughout the state, OR blockaders have used special heavy-duty locks and chains to attach themselves to heavy or immovable objects and thereby frustrate and hinder law enforcement from removing them from the area.

58. At the date of the blockades, OR has deliberately kept secret their target sites to prevent law enforcement from utilizing proactive means of maintaining access to these medical facilities. On site, OR has used a crawl technique to move new blockaders in as police attempt to remove those already present. At the October 21 blockade of the Family Planning Associates facility in La Mesa,

blockaders rushed the entrance as well as crawling in and around police.

59. When police attempt to remove demonstrators, they engage in physical tactics including going limp and crossing their feet at the ankles and bending them up at the knees to prevent police from forcing OR to walk away after being arrested. All of these tactics are done deliberately to prevent police from removing demonstrators in a timely fashion and maintaining access to the targeted medical facilities.

THIRD CAUSE OF ACTION

(California Constitution, Article I, sec.1)
(By all Plaintiffs Against all Defendants)

60. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

61. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually violate the laws of California, including the right to privacy guaranteed under Article I, sec. 1 of the California Constitution.

62. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

FOURTH CAUSE OF ACTION

(California Civil Code Sec. 52.1)
(By all Plaintiffs Against all Defendants)

63. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

64. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually violate the Bane Civil Rights Act as codified in California Civil Code section 52.1 in that defendants have, by threat, intimidation or coercion interfered with or attempted to interfere with plaintiffs' exercise and/or enjoyment of rights secured by the Constitution and laws of the United States and the Constitution and laws of the State of California.

65. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

FIFTH CAUSE OF ACTION

(Tortious Interference with Business)
(By all Plaintiff Clinics
and Doctors Against all Defendants)

66. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

67. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' businesses.

Feb 07 00 11:28a P.3

68. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

SIXTH CAUSE OF ACTION

(Trespass)
(By all Plaintiff Clinics and
Doctors Against all Defendants)

69. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

70. The actions planned by defendants, jointly and individually, constitute an intentional tortious trespass on the targeted clinics and abortion providers.

71. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

SEVENTH CAUSE OF ACTION

(Intentional Infliction of Emotional Harm)
(By all Plaintiffs Against all Defendants)

72. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

73. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

Feb 07 00 11:28a P.4

74. As a result of the aforesaid actions by defendants, plaintiffs have suffered damages in an amount to be proven at trial. Defendants' actions were willful and malicious. Thus, plaintiffs are entitled to punitive damages.

EIGHTH CAUSE OF ACTION

(Public Nuisance)
(By all Plaintiffs Against all Defendants)

75. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

76. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare of the cities in which the targeted clinics are located, and their residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this action as follows:

1. Declaring that the conduct complained of defendants is violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the California Constitution; and,

2. Declaring that the conduct complained of defendants is violative of the individual women plaintiffs' rights to travel under the United States Constitution; and,

3. Declaring that the conduct complained of defendants is violative of plaintiffs' rights under California Civil Code sec. 52.1 to be free from threat, intimidation or coercion in the exercise or enjoyment of rights secured to all persons; and,

4. Declaring that the conduct complained of defendants constitutes a tortious interference with plaintiff clinics' and doctors' business; and,

5. Declaring that the conduct complained of defendants constitutes a trespass against plaintiff clinics' and doctors' property; and,

6. Declaring that the conduct complained of defendants constitutes an intentional infliction of emotional harm upon plaintiffs; and,

7. Granting plaintiffs a preliminary and permanent injunction restraining and enforcing the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever, known or unknown, acting on their own behalf or in concert with them, in any manner or by any means from:

A. trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from any facility at which abortions or other family planning services are provided in the state of California, including conducting "sidewalk counseling" of plaintiffs in a manner which physically impedes plaintiffs' movement, and demonstrating within fifteen (15) feet of any entrance or exit to the plaintiff facilities during any "field-training sessions," the national "siege" from March 22 to March 25, 1989, and until the conclusion of

a planned blockade called "Operation Rescue" or a similarly structured action;

B. physically abusing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the State of California through March 22 to March 25, 1989 or the conclusion of blockade activities, whichever is later;

C. attempting or directing others to take any of the actions described in paragraphs A and B above;

D. providing that nothing in the Court's Order should be construed to limit defendants' exercise of their First Amendment rights;

E. directing the defendant organizations and their officers and the defendant individuals and those working in concert with them, to inform all members of the organizations and conspiracy believed to be planning to participate in the activities enjoined in paragraphs A through C above of this Order;

F. granting compensatory and punitive damages;

G. waiving the requirement in Fed. R. Civ. P. 65(c) that plaintiffs post bond or in the alternative establishing a nominal bond in the amount of $500;

H. granting plaintiffs' reasonable attorneys' fees, pursuant to, among other things, 42 U.S.C. section 1988; and,

///

///

///

///

I. granting such other and further relief as the Court deems just and proper.

DATED: October 27, 1989

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES

PAUL PERSONS, ESQ.

By Carol A. Sobel
CAROL A. SOBEL

EXHIBIT B

PROOF OF SERVICE BY MAIL

I, KAREN MIYAHARA, declare:

I am a resident of the County of Orange, California; that I am over the age of eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Los Angeles, California; and that my business address is 633 S. Shatto Place, Los Angeles, California 90005.

On October 27, 1989, I served a copy of the attached documents described as FIRST AMENDED COMPLAINT (CLASS ACTION) (Civil Rights) on the parties of record in said cause by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

ROBERT L. SASSONE
900 N BROADWAY, STE 725
SANTA ANA, CA 92701
(For Randy Adler)

STEPHEN E. HURST
755 CREST DR
ENCINITAS, CA 92024
(For Connie Youngkin)

CYRUS ZAL
102 MAINSAIL COURT
FOLSOM, CA 95630
(For Ken Tanner, Jeff White, Will Lehman, John Burns, Robert Conger, Linda Conger, Thorn Renfro, Charles Salamina, Thomas Scanlan, Kevin Wells, Stevene Manzano, Jeff Barns, Paul McConnell, Peter Hassl, Lawrence Shrank, Robert Jasso, Joseph Foreman)

I am readily familiar with the office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on October 27, 1989, at Los Angeles, California.

Karen Miyahara
KAREN MIYAHARA

APPENDIX B

CAROL A. SOBEL
JOHN HAGAR
PAUL L. HOFFMAN
TRACY RICE
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

BETTY WHEELER
ACLU FOUNDATION OF SAN DIEGO
AND IMPERIAL COUNTIES
1202 Kettner Boulevard, Suite 6200
San Diego, California 92101
(619) 232-2121

Attorneys for Plaintiffs

FILED
MAR 2 - 1989
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
MAR 1 1989
CENTRAL DISTRICT OF CALIF...
BY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION; CAROLYN THOMPSON; GAYLE BERRY; FAMILY PLANNING ASSOCIATES MEDICAL GROUP; FEDERATION OF FEMINIST WOMEN'S HEALTH CENTER; PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD OF SAN DIEGO; HER MEDICAL CLINIC; PASADENA PLANNED PARENTHOOD COMMITTEE, INC.; CARING WOMAN; CLINICA MEDICA PARA LA MUJER; DR. LEON SCHIMMEL; CALIFORNIA NOW; WOMANCARE, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES; HEALTH CARE CENTER FOR WOMEN; PICO WOMEN'S MEDICAL GROUP; FAMILY PLANNING MEDICAL CLINIC; and PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, Plaintiffs, vs. OPERATION RESCUE; JEFF WHITE; JOSEPH FOREMAN; DR. RANDY ADLER; and JOHN AND JANE DOES 1 through 100, inclusive, Defendants.	CASE NO. 89 1181 AWT (Bx) [PROPOSED ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND/OR ORDER TO SHOW CAUSE RE: ISSUANCE OF PRELIMINARY INJUNCTION

After considering the complaint, plaintiffs' ex parte application for a temporary restraining order and/or an order to show cause re: issuance of preliminary injunction, the accompanying declarations, exhibits, memorandum of points and authorities, and the facts presented to the Court regarding defendants' policy and practice of prior restraint, the Court finds that there is substantial likelihood that plaintiffs will prevail on the merits of their claims that they have been unlawfully restrained in the exercise of their constitutional and statutory rights to travel, to obtain an abortion, to privacy, to be free from interference by force or intimidation with the exercise of the aforesaid rights, and to be free of such other tortious conduct as defendants have engaged in, and that failure to grant immediate relief will cause plaintiffs substantial irreparable injury. Accordingly,

IT IS SO ORDERED that pending hearing and determination of the Order to Show Cause re: issuance of a preliminary injunction, the above-named defendants and each of them and all persons acting in concert and participating with them shall be and are hereby restrained and enjoined from interfering with plaintiffs' rights to travel, to obtain an abortion and other medical services, to privacy, to be free from interference by force or intimidation with the exercise of the aforesaid rights, including by conduct constituting trespass, public nuisance, intentional infliction of emotional harm, and interference with prospective economic interests and shall:

1. immediately cease trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from any facility at which abortions or other family planning or gynecological services

are provided in the State of California, including conducting "sidewalk counseling" of plaintiffs in a manner which physically impedes plaintiffs' movement, and demonstrating within fifteen (15) feet of any entrance or exit to the plaintiff facilities during any actions maintained by "Operation Rescue" or a similarly structured action;

2. physically abusing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the State of California through the conclusion of blockade activities;

3. attempting or directing others to take any of the actions described in paragraphs 1 and 2 above;

4. providing nothing in the Court's Order should be construed to limit defendants' exercise of their First Amendment rights;

5. directing the defendant organizations and their officers and the defendant individuals and those working in concert with them, to inform all members of the organizations and conspiracy believed to be planning to participate in the activities enjoined in paragraphs 1 through 3 above of this Order.

IT IS FURTHER ORDERED that the above-named defendants appear in this courtroom located at 312 N. Spring Street, Los Angeles, California 90012 on 3/13, 1989 at 11:4. m. to show cause why they and each of them and all persons acting in concert and participating with them should not be enjoined from interfering with plaintiffs' exercise of their rights to travel, obtain an abortion and other medical services, privacy, freedom from interference by force or intimidation with the equal exercise

or enjoyment of all rights, privileges and immunities, be from such other tortious conduct as the defendants are alleged to have engaged in and should not be ordered to:

1. Immediately cease any and all interference with the exercise of fundamental constitutional and statutory rights by the plaintiffs, including the right to choose an abortion, as set forth in paragraphs 1 through 3 above.

DATED: 3/2/89

Terry J. Hatter Jr.
UNITED STATES DISTRICT JUDGE

Respectfully presented by:

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES

By: Carol A. Sobel
Carol A. Sobel
Attorneys for Plaintiffs

EXHIBIT C

APPENDIX C

ORIGINAL

CAROL A. SOBEL
JOHN HAGAR
PAUL L. HOFFMAN
TRACY RICE
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

BETTY WHEELER
ACLU FOUNDATION OF SAN DIEGO
AND IMPERIAL COUNTIES
1202 Kettner Boulevard, Suite 6200
San Diego, California 92101
(619) 232-2121

Attorneys for Plaintiffs

Lodged prop order.

10:05 am
13 1989

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION; CAROLYN THOMPSON; GAYLE BERRY; FAMILY PLANNING ASSOCIATES MEDICAL GROUP; FEDERATION OF FEMINIST WOMEN'S HEALTH CENTER; PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD OF SAN DIEGO; HER MEDICAL CLINIC; PASADENA PLANNED PARENTHOOD COMMITTEE, INC.; CARING WOMAN; CLINICA MEDICA PARA LA MUJER; DR. LEON SCHIMMEL; CALIFORNIA NOW; WOMANCARE, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES; HEALTH CARE CENTER FOR WOMEN; PICO WOMEN'S MEDICAL GROUP; FAMILY PLANNING MEDICAL CLINIC; and PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, Plaintiffs, vs. OPERATION RESCUE; JEFF WHITE; JOSEPH FOREMAN; DR. RANDY ADLER; and JOHN AND JANE DOES 1 through 100, inclusive, Defendants.	CASE NO. CV 89-1181 AWT (Bx) SUPPLEMENTAL EXHIBITS IN SUPPORT OF REQUEST FOR CIVIL CONTEMPT FINES DATE: March 13, 1989 TIME: 11:00 A.M. DEPT: The Honorable A. Wallace Tashima

PROOF OF PERSONAL SERVICE

I, CAROL A. SOBEL, declare:

I am a resident of the County of Los Angeles, California; that I am over the age of eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Los Angeles, California; and that my business address is 633 S. Shatto Place, Los Angeles, California 90005.

On March 13, 1989, I served a copy of the attached documents described as SUPPLEMENTAL EXHIBITS IN SUPPORT OF REQUEST FOR CIVIL CONTEMPT FINES on the parties of record in said cause by handing a true and correct copy thereof to each of the defendants or his counsel prior to the hearing on the preliminary injunction in U.S. District Court this date:

OPERATION RESCUE
1299 EUCLID, STE. 217
GARDEN GROVE, CA. 92653

ROBERT SASSONE
900 N. BROADWAY, STE. 725
SANTA ANA, CALIF.

JEFF WHITE
2909 KRISTI COURT
SANTA CRUZ, CALIF. 95065

JOSEPH FOREMAN
OPERATION RESCUE
350 E. MARKET STREET
LONG BEACH, CALIF.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed this 13th day of March, 1989 at Los Angeles, California.

Carol A. Sobel

CAROL A. SOBEL

//

Feb 07 00 08:54p p.2

DECLARATION OF PENNY BERTSCH

I, Penny Bertsch do hereby declare as follows:

1. I am employed at the Chico Feminist Women's Health Center (CFWHC), 330 Plume Street, Chico, California, member of the Federation of Feminist Women's Health Centers. My present position is that of Clinic Manager and Director of Fertility Health Services.

2. On March 11, 1989, I received a phone call from Shauna Heckert, Director of the Sacramento Feminist Women's Health Center informing me that Operation Rescue (OR) was on their way to the Chico Feminist Women's Health Center. The CFWHC had women scheduled to receive medical services that morning, including abortions and fertility services.

3. On March 11, 1989, having received the warning concerning the arrival of Operation Rescue, I went to the CFWHC, arriving at approximately 8:00 a.m. I arrived prior to the OR people arriving. I instructed one of my staff to stand at the door to the entrance of the CFWHC on Plume Street to let me know when the OR people arrived. I then went to make copies of the Federal Temporary Restraining Order (See Exhibit A) to serve on the OR people.

4. At approximately 8:30 a.m. on this same date, I went down to the entrance of the CFWHC, where I saw hundreds of people, some wearing tee shirts, buttons and/or hats saying, "OPERATION RESCUE", coming down Flume street toward the CFWHC entrance. Two escorts from the CFWHC joined me at the door just prior to the crowd of OR people rushing the entrance to the CFWHC. The three of us were pushed up against the glass doors at the

/

Feb 07 00 08:54p p.3

entrance by the OR people who were being told by people with megaphones to squeeze in close to the door and lock arms. The glass doors to CFWHC were locked and I was afraid that the door would break. I told the OR people to back up and give us some room. They told me that "what ever happened was gods will". They kept pushing us against the door until the Chico police arrived a few minutes later. Then a man with a megaphone called by others as "Murry", told the OR people blocking the door to sit down as close as possible and lock arms. Murry told everyon to go limp if arrested. In front of me there was a mass of OR people blocking the entire sidewalk and entrance into the CFWHC. No one was able to leave or enter through the front entrance to the CFWHC.

5. I then very loudly read the Federal Temporary Restraini Order to the crowd of OR people in front of me. I also saw paralegals handing our copies of the Federal Temporary Restraini Order. Murry then told the OR people not to accept the Tempora Restraining Order. There was then hundreds of copies of the Temporary Restraining Order littering the ground.

6. A Chico police officer then advised those persons bloc the entrance to the CFWHC that they would be arrested for obstr ting the sidewalk if they did not move and allow people to pass. The Chico Police then began to arrest the people blocking the entrance. Each time one person was arrested another person would move into that persons spot and lock arms with those next to them. During the time people were being arrested one client tried to enter the CFWHC, only to be grabbed and knocked back. She was not able to gain entrance to the clinic.

7. At approximately 1:00 p.m. that same day, after the Chico Police had arrested over two hundred OR people, I was able to leave the entrance to the CFWHC.

I declare under penalty of perjury under the laws of the State of California that I have read the foregoing and that it is true and correct to the best of my knowledge. Executed on this 12th day of March, 1989, at Chico, California.

Penny Bertsch

PENNY BERTSCH

DECLARATION OF DIDO HASPER

I, Dido Hasper, do hereby declare as follows:

1. I am currently the Executive Director of Chico Feminist Women's Health Center (CFWHC), 330 Flume Street, Chico, Californi and President of the Federation of Feminist Women's Health Center

2. On March 11, 1989, I received a phone call from Shauna Reckert, Director of the Sacramento Feminist Women's Health Center informing me that Operation Rescue (OR) was on their way to the Chico Feminist Women's Health Center. The CFWHC had women scheduled to receive medical services that morning, including abortions and fertility services.

3. On March 11, 1989, having received the warning concerni the arrival of Operation Rescue, I went to the CFWHC, arriving at approximately 8:00 a.m. I arrived prior to the OR people arriving. I went into the CFWHC and called the Chico Police Department, requesting that officers be sent to the CFWHC as soon as possible. I then attempted to go out the front entrance but was unable to do so. My clinic director Penny Bertsch and two escorts were pined up against the doors to the CFWHC, with a large crowd of people in front of them.

4. I was able to exit the CFWHC through a side exit, where upon I went to talk with Officer Lawson of the Chico Police Department. I told Officer Lawson that we had women scheduled for abortion and other medical services that morning and that we needed to have the entrance to the CFWHC cleared. I provided Officer Lawson with a copy of the Federal Temporary Restraining Order and told him about the Butte County Superior Court, Prelin inary Injunction which was on file at the Chico Police Departme

(see Exhibit A).

5. I then observed Penny Bertsch hand some copies of the Federal Temporary Restraining Order to OR people blocking the entrance to the CFWHC and heard Penny Bertsch read the Federal Temporary Restraining Order to the OR people blocking the entrance to the CFWHC. I also observed paralegals handing out copies of the Federal Temporary Restraining Order to the OR people blocking the entrance to the CFWHC.

6. At approximately 10:00 a.m. on this same morning, I personally handed Joseph Scheidler a copy of the Federal Temporary Restraining Order.

7. That morning I personally observed the Chico Police order the OR people to disperse or be arrested. I then observed the Chico Police and other officers arrest OR persons, first asking them to walk to the van or bus. When an OR person refused to cooperate with the police they were carried to the bus or van by the officers. Prior to loading OR people into the bus or van they would be photographed and their name placed on the photo.

8. Later that afternoon I was present in the Chico Municipa Court and observed Joseph Scheidler be charged with a violation of 647c of the California Penal Code and section 9.44.010 of the Chico Municipal Code. (see Complaint attached Exhibit B). Joseph Scheidler entered a plea of no contest to Chico Municipal Code 9.44.010 on the condition that the 647c charge was dismissed He received a $100.00 fine.

9. On that same afternoon while in court, I observed Jeffer L. White, be charged with a violation of 747c of the California

Penal Code and section 9.44.010 of the Chico Municipal Code (see complaint Exhibit C). Jeffery White pled not guilty to both charges and was ordered to appear back in court for a pre-trial hearing. I personally saw Jeffery White blocking the entrance to the CFWHC.

10. I estimate that there were approximately 500 people involved with Operation Rescue with approximately 200 people being arrested and charged.

I declare under penalty of perjury under the laws of the State of California that I have read the foregoing and that it is true and correct to the best of my knowledge. Executed on this 12th day of March, 1989, at Chico, California.

DIDO HASPER

PAUL T. PERSONS
Attorney At Law
1834 Arroyo Canyon Drive
Chico, CA 95928
(916) 893-4710

CATHLEEN A. WILLIAMS
KANTER, WILLIAMS, MERIN AND DICKSTEIN
1014 Ninth Street
Sacramento, CA 95814

Attorneys for Plaintiff[illegible]

FILED
FEB 27 1986
ELEANOR M. BECKER, County Clerk
By S. NELSON Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF BUTTE

CHICO FEMINIST WOMEN'S HEALTH CENTER, a California Non-Profit Corporation,

Plaintiff,

v.

FRANCES SCULLY, CATHY MILLER, DAVID HELSETH, KATHY MANN, VICTOR DAVIDSON, EDNA EVELYN DAVIDSON, CAROLYN LINDSEY, AND DOES 1 through 100, inclusive,

Defendants,

CASE NO.: 89695

TEMPORARY RESTRAINI ORDER

ORDER

Upon reading the verified Complaint for Injunction on fil this action and the supporting declarations and points and authorities filed therewith and hearing oral argument and oral testimony, it appears to the satisfaction of the Court therefr that this is a proper case for granting a temporary restrainin order.

Exhibit A 1

IT IS ORDERED THAT until further order of this court, said defendants above named, and their officers, agents, representati employees and members, and each of them, and each and every per acting at the direction of, or in combination or in concert wit said defendants be, and hereby are, restrained and enjoined fro doing any of the acts or things herein set forth below:

(1) Either the defendants or plaintiff photographing any person at or coming to or going from 330 Flume Street;

(2) Blocking any entrance and exit into the Chico Feminist Women's Health Center, located at 330 Flume Street, Chico, California;

(3) Plainitff and defendants from shouting and/or using an voice amplification devices for the purpose of harassment, and/or demonstrating at the CFWHC, located at 330 Flume Street;

(4) Using any tape recording device or recording device in front of the Health Center at the location of 330 Flume Street;

(5) Following clients and/or from being within 15 feet of clients in their cars without having been invited;

(6) Picketing, parading, marching, standing, occupying, assembling, grouping or gathering, or inducing, encouraging, or causing such conduct in the following area:

A zone 10 feet wide from the doorway of plaintiff's premises to Flume Street.

Provided however, that, defendants may cross said zone one a a time nine feet or more from the wall of the building in

order to pass from one side of the sidewalk to the other; a provided, however, that defendants may maintain, under conditions herein specified, one (1) picket or other person at either side of such 10 foot zone;

(7) Picketing, parading, marching, standing, walking, assembling, grouping, or gathering or stationing, placing o maintaining pickets within 10 feet from any other picketer. Such 10 foot distance is to be maintained by all picketers within the zone which extends 25 feet from the most norther and most southernly point of the building located at 330 Flume Street;

(8) Accosting, addressing, or offering literature to, any employee, agent, client, visitor, business invitee of plaintiff who has already refused such offer or address;

(9) Standing in or stepping in the path or right of way of plaintiff's employees, agents, clients, visitors, busine invitees, on the west sidewalk of Flume Street between Thir and Fourth Streets, Chico, California;

(10) Recording license plates of plaintiff's employees, agents, clients, visitors and business invitees;

(11) Clinic may escort clients, using two escorts to the Clinic and two escorts from the Clinic. Clients may not be shielded from pickets by means of umbrellas of otherwise unless client chooses to be shielded.

DATED this 27th day of February, 1986.

Done in open Court on the 27th day of Feb 19 86 and presented for signature, and signed this 27th day of Feb 19 86

LOYD MULKEY, JR.
Judge of the Superior Court

FILED

APR 25 1986

ELEANOR M. BECKER, County Clerk

By [signature] Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF BUTTE

CHICO FEMINIST WOMEN'S HEALTH CENTER, a California Non-Profit Corporation, Plaintiff, vs. FRANCES SCULLY, CATHY MILLER, DAVID HELSETH, KATHY MANN, VICTOR DAVIDSON (A.K.A. PHIL, BILL), EDNA EVELYN DAVIDSON, CAROLYN LINDSEY, and DOES 1 through 100, inclusive, Defendants.	NO. 89695 ORDER

The Temporary Injunction heretofore issued herein on February 27, 1986 is hereby amended to provide:

1. No picketer shall identify or disclose the identity of any person approaching, entering, or leaving the Health Center at 330 Flume Street, or harass any person in this fashion.

2. Picketers must maintain a 10 foot distance from any other picketer at all times on Flume Street between 3rd and 4th Street. This includes coming to or leaving the area.

Feb 06 00 06:38p p.3

3. At no time shall there be more than 7 picketers on Flume Street between 3rd and 4th Streets in Chico, California.

Except as amended herein, said Temporary Injunction of February 27, 1986 and all the provisions thereof shall remain in full force and effect.

DATED: April 25, 1986

LOYD H. MULKEY, JR.
Judge of the Superior Court

Feb 06 00 06:39p p.4

PAUL L. HOFFMAN
TRACY RICE
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

BETTY WHEELER
ACLU FOUNDATION OF SAN DIEGO
AND IMPERIAL COUNTIES
1202 Kettner Boulevard, Suite 6200
San Diego, California 92101
(619) 232-2121

Attorneys for Plaintiffs

MAR 2 - 1989

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION; CAROLYN THOMPSON; GAYLE BERRY; FAMILY PLANNING ASSOCIATES MEDICAL GROUP; FEDERATION OF FEMINIST WOMEN'S HEALTH CENTER; PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD OF SAN DIEGO; HER MEDICAL CLINIC; PASADENA PLANNED PARENTHOOD COMMITTEE, INC.; CARING WOMAN; CLINICA MEDICA PARA LA MUJER; DR. LEON SCHIMMEL; CALIFORNIA NOW; WOMANCARE, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES; HEALTH CARE CENTER FOR WOMEN; PICO WOMEN'S MEDICAL GROUP; FAMILY PLANNING MEDICAL CLINIC; and PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES,

Plaintiffs,

vs.

OPERATION RESCUE; JEFF WHITE; JOSEPH FOREMAN; DR. RANDY ADLER; and JOHN AND JANE DOES 1 through 100, inclusive,

Defendants.

CASE NO.

[PROPOSED] ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND/OR ORDER TO SHOW CAUSE RE: ISSUANCE OF PRELIMINARY INJUNCTION

Exibit A

12 -

Feb 08 00 08:39p p.d

show cause re: issuance of preliminary injunction, the accompanying declarations, exhibits, memorandum of points and authorities, and the facts presented to the Court regarding defendants' policy and practice of prior restraint, the Court finds that there is substantial likelihood that plaintiffs will prevail on the merits of their claims that they have been unlawfully restrained in the exercise of their constitutional and statutory rights to travel, to obtain an abortion, to privacy, to be free from interference by force or intimidation with the exercise of the aforesaid rights, and to be free of such other tortious conduct as defendants have engaged in, and that failure to grant immediate relief will cause plaintiffs substantial irreparable injury. Accordingly,

IT IS SO ORDERED that pending hearing and determination of the Order to Show Cause re: issuance of a preliminary injunction, the above-named defendants and each of them and all persons acting in concert and participating with them shall be and are hereby restrained and enjoined from interfering with plaintiffs' rights to travel, to obtain an abortion and other medical services, to privacy, to be free from interference by force or intimidation with the exercise of the aforesaid rights, including by conduct constituting trespass, public nuisance, intentional infliction of emotional harm, and interference with prospective economic interests and shall:

1. immediately cease trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from any facility at which abortions or other family planning or gynecological services

Feb 08 00 08:39p p.d

impedes plaintiffs' [illegible]

feet of any entrance or exit to the plaintiff facilities during any actions maintained by "Operation Rescue" or a similarly structured action;

2. physically abusing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the State of California through the conclusion of blockade activities;

3. attempting or directing others to take any of the actions described in paragraphs 1 and 2 above;

4. providing nothing in the Court's Order should be construed to limit defendants' exercise of their First Amendment rights;

5. directing the defendant organizations and their officers and the defendant individuals and those working in concert with them, to inform all members of the organizations and conspiracy believed to be planning to participate in the activities enjoined in paragraphs 1 through 3 above of this order.

IT IS FURTHER ORDERED that the above-named defendants appear in this courtroom located at 312 N. Spring Street, Los Angeles, California 90012 on March 13, 1989 at 11:00 a.m. to show cause why they and each of them and all persons acting in concert and participating with them should not be enjoined from interfering with plaintiffs' exercise of their rights to travel, obtain an abortion and other medical services, privacy, freedom from interference by force or intimidation with the equal exercise

engaged in and should not be ordered to:

1. Immediately cease any and all interference with the exercise of fundamental constitutional and statutory rights by the plaintiffs, including the right to choose an abortion, as set forth in paragraphs 1 through 3 above.

DATED: 2 - MAR 1989

[illegible] J. [illegible], JR.

UNITED STATES DISTRICT JUDGE

Respectfully presented by:

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES

By: Carol A. Sobel
Carol A. Sobel
Attorneys for Plaintiffs

MAR 11 1989

In The Municipal Court

NORTH County Judicial District

County of Butte, State of California

The People of the State of California, Plaintiff.

vs.

JOSEPH M. SCHEIDLER, Defendant(s)

COMPLAINT—CRIMINAL

NO. 37613

MICHAEL L. RAMSEY, being informed and believing and based upon such information and belief, complains and accuses the said defendant(s) of the crime of OBSTRUCTING THOROUGHFARES a violation of Section 647c of the California Penal Code, a misdemeanor, committed as follows: The ~~acts~~ the above named defendant on or about March 11, 1989 in the North County Judicial District, County of Butte, State of California, did wilfully and maliciously obstruct the free movement of any person on a street or sidewalk , or, on or in any place open to the public.

COUNT II

For a further and separate cause of complaint, being a different statement of the same offense as the charges set forth in Count I hereof, complainant further complains and accuses said above named defendant of the crime of UNLAWFUL OBSTRUCTION OF A SIDEWALK, a violation of Section 9.44.010 of the CHICO MUNICIPAL CODE, an infraction, committed as follows: the said defendant did, on or about March 11, 1989, in the City of Chico, in the County of Butte, State of California, did unlawfully obstruct the free passage of pedestrians upon a sidewalk within the City of Chico.

Deputy District Attorney
(for) Michael L. Ramsey

(Exhibit B)

Feb 06 00 06:41p P.3

FILED

MAR 11 1989

In The Municipal Court

NORTH County Judicial District

County of Butte, State of California

The People of the State of California, Plaintiff.

vs.

JEFFREY L. WHITE, Defendant(s)

COMPLAINT--CRIMINAL

NO. 37601

MICHAEL L. RAMSEY, being informed and believing and based upon such information and belief, complains and accuses the said defendant(s) of the crime of OBSTRUCTING THOROUGHFARES a violation of Section 647c of the California Penal Code, a misdemeanor, committed as follows: The ~~acts~~ the above named defendant on or about March 11, 1989 in the North County Judicial District, County of Butte, State of California, did wilfully and maliciously obstruct the free movement of any person on a street or sidewalk , or, on or in any place open to the public.

COUNT II

For a further and separate cause of complaint, being a different statement of the same offense as the charges set forth in Count I hereof, complainant further complains and accuses said above named defendant of the crime of UNLAWFUL OBSTRUCTION OF A SIDEWALK, a violation of Section 9.44.010 of the CHICO MUNICIPAL CODE, an infraction, committed as follows: the said defendant did, on or about March 11, 1989, in the City of Chico, in the County of Butte, State of California, did unlawfully obstruct the free passage of pedestrians upon a sidewalk within the City of Chico.

Deputy District Attorney
(for) Michael L. Ramsey

(Exhibit C)

Feb 06 00 06:41p P.4

EXHIBIT D

APPENDIX D

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST-CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 3/15/89

DEPUTY CLERK

FILED

MAR 15 1989

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION, et al.,

Plaintiffs,

v.

OPERATION RESCUE; JEFF WHITE; JOSEPH FOREMAN; DR. RANDY ADLER; and JOHN AND JANE DOES 1 through 100, inclusive,

Defendants.

NO. CV 89-1181-AWT

PRELIMINARY INJUNCTION

After hearing, in accordance with the findings of fact and conclusions of law orally made in open court on the record,

IT IS ORDERED:

1. Pending trial on the merits, defendants Operation Rescue, Jeff White, Joseph Foreman and Dr. Randy Adler (defendants), their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this Preliminary Injunction by personal service or otherwise, and each of them, hereby are enjoined and restrained from:

Feb 06 00 06:47p P.03

(a) Interfering with the rights of plaintiffs, and persons similarly situated as plaintiffs, to travel, to obtain abortions and other medical services, and to privacy, by coercion, intimidation or force;

(b) Trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from any facility at which abortions, family planning or gynecological services are provided in the State of California, including conducting "sidewalk counseling" of plaintiffs and others similarly situated, in a manner which physically impedes plaintiffs' movement, and demonstrating within fifteen (15) feet of any entrance or exit to any such facility during any actions maintained by "Operation Rescue" or a similarly structured action;

(c) Physically abusing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the State of California through the conclusion of blockade activities; and

(d) Attempting or directing others to take any of the actions described in subparagraphs (a), (b) and (c) of this paragraph 1.

2. Defendants and their officers are directed to inform all persons who assemble to participate in a rescue operation or similar event in concert with defendants of this Preliminary Injunction either by presenting all such persons with copies of this Preliminary Injunction or by reading the provisions of this Preliminary Injunction to the assembled persons prior to the commencement of any rescue or other group action.

Feb 06 00 06:48p P.04

3. Nothing in this Preliminary Injunction shall be construed to limit defendants' exercise of their First Amendment rights.

4. The security required by F.R.Civ.P. 65(c) is set at $1,000, i.e., the amount of security set on issuance of the temporary restraining order is deemed adequate for the Preliminary Injunction.

DATED: MAR 15 1989

A. WALLACE TASHIMA
United States District Judge

JUN 19 2002

42 37

No. 01-1118 & No. 01-1119

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ET AL., *Petitioners*
v.
NATIONAL ORGANIZATION FOR WOMEN, *Respondent*

OPERATION RESCUE, *Petitioner*
v.
NATIONAL ORGANIZATION FOR WOMEN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
COUNSEL

P.O. BOX 4041
RIO RICO, AZ 85648
(520) 281-7513

14 pp.

TABLE OF CONTENTS

Page

Interest of Counsel 1

Summary of Argument.....1

Argument:

I.

THE COURT USED THE MOCK TRIALS TO EFFECT AND MAINTAIN ITS ROE v. WADE KILLINGS WHICH THE NUREMBERG TRIBUNAL CONDEMNED AS "NOT A JUDICIAL PROCEEDING BUT A MURDER".....1

A. The Court effected and maintains its *Roe v. Wade* killings by unconstitutionally refusing to allow counsel to represent the unborn and defend their constitutional right to life.....1

B. The Court effected its *Roe v. Wade* killings by unconstitutionally refusing to allow any prior notice of the standards, the burdens, or the evidence which it used to infer that the lives of the unborn are not protected by the Constitution.....4

C. The Court effected its *Roe v. Wade* killings by using unconstitutional secret proceedings to find evidence to infer that the lives of the unborn are not protected by the Constitution.....6

D. The Court effected and maintains its *Roe v. Wade* killings by unconstitutionally refusing to allow its evidence, which it used to imply that the lives of the unborn are not protected by the Constitution, to be confronted and cross-examined 7

Page

E. The Court effected and maintains its *Roe v. Wade* killings by unconstitutionally refusing to allow evidence to be presented on behalf of the unborn to prove that the Constitution's guarantee of life to "any person" does include the unborn.....8

Conclusion On Judicial Procedures 10

II.
COUNSEL FOR THE UNBORN RAISES ISSUES, NOT RAISED BY THE PARTIES, WHICH DISPOSE OF THIS CASE.....11

A. The U.S. Constitution's guarantee of life to "any person" does include the unborn.....11

B. The U.S. Supreme Court and leaders of the U.S. Government maintain the *Roe v. Wade* killings by conspiring to impose the same Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg.....11

Conclusion 20

Table of Authorities

Cases: Page

Dred Scott v. Sanford, 19 How. 393 (1857) 4

Ernest v. U.S. Attorney for the Eastern District of Virginia, U.S. Attorney General, cert. denied 475 U.S. 1085 (1986) 13, 14

Ernest v. Rehnquist, Stevens, Breyer O'Connor, Scalia, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General, in the Circuit Court of Fairfax County, Va., Civil No. 90367 15

Ernest v. Rehnquist, Stevens, Breyer O'Connor, Scalia, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General, in the U.S. District Court in Alexandria, Civil No. 89-732A.....15, 16, 18

Goldberg v. Kelly, 397 U.S. 254 (1970) 3

Imbler v. Pachtman, 424 U.S. 409 (1976).....3

In Re Gault, 387 U.S. 1 (1967) 3

United States v. Altstoetter [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals (1951).....10, 12

Books

Alan Ernest, *Mass Murder is Liberty: How The United States Is Ruled By The Decree MASS MURDER IS LIBERTY* (1998) 1,4,11,12,17,18

Briefs and Applications Filed in this Court

Page

Amicus curiae brief by the Legal Defense for Unborn Children, filed in this case 4, 11, 12

Petition for Certiorari, *Ernest v. U.S. Attorney for the Eastern District of Virginia* and *U.S. Attorney General*, cert. denied 475 U.S. 1085 (1986).....13-14

Petition for Rehearing, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) 2, 5, 6, 7-8, 9

U.S. Constitution:

Fifth Amendment

- Guarantee of life to "any person".....1, 11
- Due Process of Law 1-10
- Mock Trials as Murders 10-11

Fifth and Sixth Amendments:

- Assistance of Counsel.....1-3
- Prior Notice 4-5
- Secret Proceedings 6-7
- Confrontation and Cross-Examination.....7-8
- Presentation of Evidence 8-10
- Mock Trials as Murders 10-11

Fourteenth Amendment

- Guarantee of life to "any person".....1, 11

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow counsel to represent the children being killed by *Roe v. Wade*, 410 U.S. 113. Since there will be no expense to the Court, this is effectively a motion to allow retained counsel.

INTEREST OF COUNSEL

Counsel will prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

SUMMARY OF ARGUMENT

The unborn have a legal right to be represented by counsel, and to be aided by all the procedures guaranteed by the Constitution, so counsel can prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

ARGUMENT

I.

THE COURT USED THE MOCK TRIALS TO EFFECT AND MAINTAIN ITS *ROE v. WADE* KILLINGS WHICH THE NUREMBERG TRIBUNAL CONDEMNED AS "NOT A JUDICIAL PROCEEDING BUT A MURDER."[1]

A. The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Counsel To Represent The Unborn And Defend Their Constitutional Right To Life.

---

[1] The Court's procedures are also described in the book by Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled by the Decree MASS MURDER IS LIBERTY* 45-53 (1998).

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in *Roe v. Wade*. An original party objected that the unborn should be represented by counsel in the U.S. Supreme Court:

> "(T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth." Petition for Rehearing 5, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow counsel to represent the unborn, and defend their right to life under the Constitution.[2]

---

[2] *Colautti v. Franklin*, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; *Anders v. Floyd*, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; *Bellotti v. Baird*, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; *Ashcroft v. Freiman*, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; *United States v. Zbaraz*, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; *Harris v. McRae*, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; *H.L. v. Matheson*, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; *Simopoulos v. Virginia*, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; *Akron Center for Reproductive Health v. Akron*, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; *Diamond v. Charles*, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; *Hartigan v. Zbaraz*, 484 U.S. 171, motion to allow counsel for the unborn denied 479 U.S. 1003; *Webster v. Reproductive Health Services*, 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, motion to allow counsel for the unborn denied 493 U.S. 802; *Hodgson v. Minnesota*, 497 U.S. 417, motion to allow counsel for the unborn denied 492 U.S. 803; *New York v. Sullivan*, 500 U.S. 173, motion to allow counsel for the unborn denied 497 U.S. 1002; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L Ed 2d 674, motion to allow counsel for the unborn denied 117 L Ed 2d 614; *National Organization for Women v. Scheidler*, 126 L Ed 2d 99, motion to allow counsel for the unborn denied 125 L Ed 2d 786 (1993); *Schenck v. Pro-Choice Network of Western New York*, 137 L Ed 2d 1 (1996), motion to allow counsel for the unborn denied 135 L Ed 2d 188 (1996); *Hill v. Colorado*, 147 L Ed 2d 597 (1999) motion to allow counsel to represent unborn denied 145 L Ed 2d 405 (1999); *Stenberg v. Carhart*, 147 L Ed 2d 743 (2000), motion to allow counsel for the unborn denied, 146 L Ed 2d 216 (2000).

The unborn have a constitutional right to be represented by counsel to defend their right to life under the U.S. Constitution.[3] Judges who willfully deny this right are guilty of crime.[4] This denial makes *Roe v. Wade* void.

---

[3] Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees: (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; and (4) the right to present evidence. *Goldberg v. Kelly*, 397 U.S. 254, 268-271 (1970); *In Re Gault*, 387 U.S. 1 (1967).

Will the Court claim that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S. Constitution so that she could be killed with impunity from criminal laws? This is preposterous, and monstrous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Everyone is entitled to all these procedural protections before any court can decree that their life is not protected by the Constitution, and they can be killed with impunity from criminal statutes.

[4] "Even judges ... could be punished criminally for willful deprivations of constitutional rights." *Imbler v. Pachtman*, 424 U.S. 409 (1976).

B. The Court Effected Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Any Prior Notice Of The Standards, The Burdens Of Proof, Or The Evidence Which It Used To Infer That The Lives Of The Unborn Are Not Protected By The Constitution.

The U.S. District Court in *Roe v. Wade* did not even look to see if the lives of the unborn were protected by the U.S. Constitution. This question was argued for the first time after the case reached the U.S. Supreme Court. Since the Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

In the aftermath of *Dred Scott* and the Civil War, the Fourteenth Amendment was intended to assure the people that the Court could never again convulse the nation by implying another exception to the Constitution's universal guarantee of life and liberty to "any person."[5]

But in 1973, the Court not only defied this long-standing legitimate public expectation and implied another exception to the words "any person," but it also gave the parties no prior notice of the factual and legal basis of its decision.

In particular, the Court gave the parties in *Roe v. Wade* no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to imply that the Fourteenth Amendment's express guarantee of life to "any person" did not include the unborn.

The first time the parties had notice was when *Roe v. Wade* was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard **without giving the Appellees notice** or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But the Court refused to allow the original parties to have any prior notice. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that the unborn had no prior notice in *Roe v. Wade* of the factual and legal bases needed to defend the unborn's right to life under the U.S. Constitution.[7]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny

---

[5] The history of how *Dred Scott v. Sanford*, 19 How. 393 (1857), triggered the Civil War is outlined in the *amicus curiae* brief filed herein by Legal Defense for Unborn Children at 4-6. *See also* Ernest, *supra* note 1, at 20-29.

In *Dred Scott*, the Court ruled that the words "any person" in the Fifth Amendment did not include black persons, and they could not sue in the Courts of the United States to see if they were free or slave.

[6] Petition for Rehearing 6, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added)

[7] *See* cases in note 2, *supra*.

[8] *See* note 3, *supra*.

his right are guilty of crime.[9] This denial makes *Roe v. Wade* oid.

C. The Court Effected Its *Roe v. Wade* Killings By Using Unconstitutional Secret Proceedings To Find Evidence To Infer That The Lives Of The Unborn Are Not Protected By The Constitution.

In *Roe v. Wade*, the Court used secret evidentiary proceedings to find evidence to imply that the Constitution's express guarantee of life to "any person" did not include the unborn. The Court conducted these secret proceedings in its back rooms. The parties were not allowed to be present. No public record was made of these secret proceedings.

The purpose of these secret proceedings was to give the Justices an opportunity to find evidence to conclude that the Constitution's guarantee of life to "any person," an express guarantee in absolute terms, did not mean what it plainly said, and to somehow imply that the unborn were excluded.

An original party objected to these secret proceedings:

> "The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are **unknown to the parties** but which apparently were **extricated from various sources by the Court's diligent research,** which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion...of constitutional stages of fetal growth." Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). [emphasis added]

The first time the victims saw the evidence used against them was after *Roe v. Wade* was promulgated and they were already condemned to death. But the Court overruled the

[9] *See* note 4, *supra.*

party's objection to its secret evidentiary proceedings. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that it used secret proceedings in *Roe v. Wade.*[10]

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[11] Judges who willfully deny this right are guilty of crime.[12] This denial makes *Roe v. Wade* void.

D. The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Its False Evidence, Which It Used To Infer That The Lives Of The Unborn Are Not Protected By The Constitution, To Be Confronted And Cross-Examined.

Since the Court used secret evidentiary proceedings, the original parties had not seen all the evidence which the Court used to imply that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to imply that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, **which facts nevertheless should be subject to refutation and counter-evidence** since they form the foundation of the

[10] *See* cases in note 2, *supra.*

[11] *See* note 3, *supra.*

[12] *See* note 4, *supra.*

Court's opinion...of constitutional stages of fetal growth.[13]

But the Court refused to allow its evidence in *Roe v. Wade*, which it used to imply that the lives of the unborn were not protected by the U.S. Constitution, to be cross-examined. Thus the Court commenced its killings.

And despite repeated objections that the Court fabricated false evidence in *Roe v. Wade* in order to imply that the Constitution's express guarantee of life to "any person" did not include the unborn, the Court has maintained its killings by steadfastly refusing to allow its evidence to be confronted and cross-examined.[14]

The unborn have a constitutional right to confront and cross-examine the evidence which the Court used to imply that their lives are not protected by the U.S. Constitution.[15] Judges who willfully deny this right are guilty of crime.[16] This denial makes *Roe v. Wade* void.

E. The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Evidence To Be Presented On Behalf Of The Unborn To Prove That The Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

In *Roe v. Wade*, the Court invented new constitutional standards on the protection of life which the parties did not see until after *Roe v. Wade* was decided. The parties never had opportunity to present evidence under these new standards.

---

[13] Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

[14] *See* cases in note 2, *supra*.

[15] *See* note 3, *supra*.

[16] *See* note 4, *supra*.

An original party requested "an opportunity to present evidence" under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution.[17]

But the Court refused to allow the party to present evidence to show that the lives of the unborn were protected

---

[17] Petition for Rehearing at 3 - 6, 8, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) [emphasis added]. The party said:

> We are dealing here with a procedure long considered outlawed and which has suddenly become legal.
>
> ....
>
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
>
> ....
>
> Appellees have had **no opportunity to show by evidence** in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
>
> ....
>
> With **no opportunity** for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.
>
> ....
>
> In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electro-cardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.
>
> ....
>
> At any rate, Appellees **should have an opportunity to present evidence** and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.

by the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[18]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[19] Judges who willfully deny this right are guilty of crime.[20] This denial makes *Roe v. Wade* void.

CONCLUSION ON JUDICIAL PROCEDURES

The Nuremberg Tribunal cited these judicial procedures as part of its evidence to convict Nazi judges of complicity in extermination and murder:

> In many instances they [the accused] were denied the right to introduce evidence, to be confronted by witnesses against them.... They were...denied the right of counsel of their own choice.... (T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.[21]

The Nuremberg Tribunal said, "Such a mock trial is not a judicial proceeding but a murder."[22]

---

[18] *See* cases in note 2, *supra.*

[19] *See* note 3, *supra.*

[20] *See* note 4, *supra.*

[21] *United States v. Altstoetter* [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-47 (1951).

[22] *Id.*, at 1164.

The Court used procedures to effect and maintain its *Roe v. Wade* killings which were not judicial proceedings but murders.

And the Court claims it can use such mock trials to decree the extermination of Jews, or anyone else, to be liberty.[23]

II.
COUNSEL FOR THE UNBORN RAISES ISSUES, NOT RAISED BY THE PARTIES, WHICH DISPOSE OF ALL ISSUES IN THIS CASE.

A. The U.S. Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

Counsel will prove that the Constitution's universal guarantee of life to "any person" does include the unborn.[24]

B. The U.S. Supreme Court And Leaders Of The U.S. Government Maintain The *Roe v. Wade* Killings By Conspiring To Impose The Nazi Doctrines On The United States Which The United States Itself Prosecuted As Extermination And Murder At Nuremberg.

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the crimes of "the supreme judge" of Nazi Germany.

At Nuremberg, the Nazi judges claimed they could not be found guilty of complicity in extermination and murder of millions of Jews and other minorities because "the supreme judge" of Nazi Germany had decreed those killings to be

---

[23] *See* pages 11-20, *infra;* Ernest, *supra* note 1, at 59-67.

[24] *Amicus Curiae* Brief by Legal Defense for Unborn Children at 1-6, filed herein and incorporated by reference. *See also* Ernest, *supra* note 1, at 20-29.

legal, and they were required to obey the decrees of "the supreme judge."[25]

Yet the United States prosecuted the Nazi judges and other justice officials for obeying the decrees of their supreme judge. And the Nuremberg Tribunal convicted them with the comment: "The dagger of the assassin was concealed beneath the robe of the jurist."[26]

The record proves that the U.S. Supreme Court conspires to impose those same Nazi doctrines on America. The Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[27] The Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, the Court has duplicated the decree of "the supreme judge" of Nazi Germany.

2.

The U.S. Supreme Court was accused in U.S. District Courts of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be legal. The U.S. Government defended its Justices by claiming that its Supreme Court must be obeyed "no matter how misguided" its decrees may appear to be. The U.S. Government expressly argued in open court that its Supreme Court must be obeyed even if it decrees the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed.... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.**
>
> **Would you argue stare decisis to me if, under *Roe v. Wade*, at the whim of neighbors Jews could be put to death?**
>
> **[U.S. Government Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[28]**

Thus, while children were being killed in defiance of murder statutes, the U.S. Government defended its Justices accused of mass murder by claiming the same Nazi doctrines which the United States itself prosecuted as complicity in extermination and murder at Nuremberg.

It was undisputed that the U.S. Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in defiance of murder statutes. Yet the U.S. Government expressly claimed in open court that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty.

Although the U.S. District Judge objected that *Roe v. Wade* was "the worst decision by the Supreme Court in the history of the Court," he adopted the U.S. Government's

---

[25] *United State v. Altstoetter*, *supra*, at 983-985, 1011, 1014.

[26] *United States v. Altstoetter*, *supra*, at 985.

[27] *Amicus Curiae* Brief By Legal Defense for Unborn Children, *supra* note 24, at 7-16. *See also* Ernest, *supra* note 1, at 29-37.

[28] *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).

arguments that he must obey the U.S. Supreme Court no matter whom it decreed a liberty to kill.[29]

3.

The petition for review of that decision filed in the U.S. Supreme Court accused it of mass murder:

> For the **67th time**, the U.S. Supreme Court is accused in its own court with mass murder in violation of State and federal statutes.[30]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused in its own Court of extermination and mass murder, and the accusations were unopposed. Yet the Court neither denied that it had decreed mass murder to be liberty, nor objected to the U.S. District Court's ruling that it must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty.

If any Justice had believed that the U.S. Supreme Court did not have the power to decree the mass murder of Jews or anyone else to be liberty, the Justice would certainly have noted his or her objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose the Nazi doctrines on the United States which the United States itself prosecuted as complicity in extermination and murder at Nuremberg. Only the names of the victims being killed have been changed.

4.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be liberty.[31] The State court was asked to "Declare that there was probable cause to believe that the U.S. Supreme Court had conspired to commit murder" in violation of the State murder law.[32] Such a ruling could have been tantamount to the start of the criminal prosecution process against the Justices for extermination and mass murder.

History had never seen a moment when it was more imperative to meet the charges, and if possible, refute them. The charges were made in court, the place designated by law to hear such charges. The courthouse is the place where anyone, including the most powerful, can be summoned, confronted with the facts, and required to adequately explain, or face the consequences.

But the Justices did not deny that they had decreed killings to be "liberty" which that State had defined to be "murder." Nor did the Justices deny that under *Roe v. Wade*, victims were being killed in defiance of the State's murder statute. Nor did the Justices deny that they had been repeatedly accused of extermination and murder in the U.S. Supreme Court, but they had never attempted to refute the charges. Nor did the Justices deny that they were seeking to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[33] Even though accused of

---

[29] Petition for Cert. at A1, *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, cert. denied without comment, 475 U.S. 1084 (1986).

[30] *Id.*, at page 50. (emphasis in text)

[31] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc.; U.S. Attorney, etc.; U.S. Attorney General*, et al, in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

[32] Complaint, *supra* note 31, at page 44.

[33] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc.; U.S. Attorney, etc.; U.S. Attorney General*, in the U.S. District Court in Alexandria, Civil No. 89-732-A.

extermination and mass murder, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather each Justice, through his or her U.S. Government lawyer, claimed that all lower courts must obey the U.S. Supreme Court even if it decreed mass murder to be liberty.[34]

And the Justices also claimed that after the U.S. Supreme Court had decreed mass murder to be liberty, the victims being killed in defiance of murder statutes could not challenge the validity of its decree in any court.[35] The U.S. District Judge adopted the Justices' claims as law by summary decree - refusing to hold any hearings, and without showing any of the allegations in the complaint to be wrong in fact or law.

Thus, in defending themselves against accusations of extermination and mass murder, each Justice of the U.S. Supreme Court claimed the power to decree the mass murder of Jews, or anyone else, to be liberty. And this claim is now accepted by the government of the United States - its courts, Congress and president - as the supreme law of the land. This has been the steadfast policy of the U.S. Government, asserted in court after court, for about a quarter-century.[36]

---

[34] The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of the [U.S. Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Ernest v. Rehnquist*, *supra* note 33, Government's Memorandum in Support of Motion to Dismiss at 3.

[35] *Id.*, Government's Memorandum in Support of Motion to Dismiss at 4.

[36] Some of these cases are: U.S. District Court in Alexandria, Civ. No. 89-732; U.S. District Court in Salt Lake City, Civ. No. 85-0026; U.S. District Court in Richmond, Civ. No. 84-0858; U.S. District Court in Portland, Civ. No. 81-0272.

All the lower federal judges who have upheld *Roe v. Wade*, and thus this Court's claim of power to decree murder and extermination to be liberty are accused herein of complicity in extermination and mass murder.[37]

5.

President Bill Clinton has repeatedly rejected pleas to withdraw the U.S. Government's claim, made in numerous courts, that its Supreme Court has the power to decree the mass murder of Jews or anyone else to be legal. President Clinton was informed:

> The general rule is that mistake of law is no excuse for breaking the law. The narrow exception of reasonable reliance on an official judicial opinion, thereafter found to be a mistake of law, does not even apply in homicide cases.
>
> ....
>
> If the U.S. Government's claim [that its Supreme Court has the power to decree the mass murder of Jews or anyone to be liberty and such decrees must be obeyed as the supreme law of the land] turns out to be a mistake of law, and you refuse to repudiate it while victims are actually being killed in defiance of murder statutes, then your acquiescence can implicate you in a national scheme of mass murder. This letter becomes a part of the record of this case as evidence of what you knew, and when you knew it.[38]

Although publicly accused of complicity in mass murder, and children were being killed in defiance of murder statutes, President Clinton repeatedly rejected requests to withdraw the

---

[37] *See* Ernest, supra n. 1, at 66 n. 31 for a partial list of federal judges accused of complicity in extermination and murder.

[38] Letter to President Clinton dated March 31, 1993, certified no. P 867-382-498, received by the White House April 9, 1993.

U.S. Government's claims, and he supported the *Roe v. Wade* killings on numerous occasions.[39]

Thus this president has contributed to this giant conspiracy to kill victims in defiance of murder statutes, and to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. A jury could find that this amounts to complicity in extermination and murder.

6.

Leaders of the U.S. Congress have also aided this conspiracy.[40] Congress has the constitutional duty to control the federal judiciary. But, as federal courts conspired to decree mass murder to be liberty, to kill children in defiance of murder statutes, and to impose Nazi doctrines on the United States, Congress defied its legal duty to control the federal judiciary.

Leaders of Congress, by acts of commission or omission, helped to maintain the *Roe v. Wade* killings.[41] But for these acts of commission or omission by members of Congress, Nazi doctrines could not have been imposed on America, and the killings could not have proceeded.

---

[39] Ernest, *supra* note 1, at 74-81.

[40] The Complaint, *supra* n. 33, at p. 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Biden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." *See also* Ernest, *supra* note 1, at 82-103.

[41] When the U.S. Congress held hearings on *Roe v. Wade*, it conspired to allow all the false evidence in *Roe v. Wade* to be presented, but refused to allow the rebuttal to be presented. Thus Congress conspired to present false evidence to the nation as if it were the truth. And many leaders of Congress have publicly endorsed the *Roe v. Wade* killings. *See also* Ernest, *supra note* 1, at 82-103.

Since children are being killed in defiance of murder statutes and others criminal laws, because leaders of Congress refuse to do their constitutional and statutory duty to control the federal judiciary, a jury could find that those leaders of Congress are guilty of complicity in extermination and murder.

7.

A U.S. courthouse has become a place where officials conspire to commit extermination and murder, fabricate false evidence to make their killings appear legal, and then maintain their killings decade after decade by conspiring to overthrow the U.S. Constitution.

8.

The evidence shows that leaders of the judicial, executive and legislative branches of the government of the United States conspire:

1. to claim the power to decree the extermination and murder of Jews, or anyone else, to be legal;
2. to actually kill victims in violation of murder statutes; and
3. to maintain their killings by supplanting the U.S. Constitution as the supreme law of the land and imposing the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg.

The human mind cannot imagine a plainer or bolder case of U.S. Officials committing treason to the U.S. Constitution.

In 1858 an unknown lawyer named Abraham Lincoln accused the U.S. Supreme Court, two U.S. Presidents, and leaders of the U.S. Congress of conspiring to overthrow the U.S. Constitution and to impose a slave empire on America.

In 1998 a book reviewed the evidence presented in this application, and asked:

Has the U.S. Supreme Court committed mass murder?

Have four U.S. Presidents committed mass murder? Have leaders of the U.S. Congress committed mass murder?[42]

These questions are now before the public, and counsel submits that the search for truth will surely continue until these questions are correctly answered.

CONCLUSION

The Court is moved to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the Constitution's guarantee of life to "any person," as used in the Fifth and Fourteenth Amendments, does include the unborn. Both the State and federal governments have a duty to protect unborn life.

Alan Ernest
Counsel

---

[42] Ernest, *supra* note 1, at 10.

Supreme Court, U.S.
FILED
JUL 8 2002
OFFICE OF THE CLERK

(41) (36)

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*, *Petitioners.*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*, *Respondents.*

OPERATION RESCUE, *Petitioner.*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

ALAN UNTEREINER*
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
(202) 775-4510 fax
Counsel for Petitioners Scheidler, Scholberg, Murphy, and the Pro-Life Action League, Inc.

JAY ALAN SEKULOW*
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, S.E.
Washington, D.C. 20003
(202) 546-8890
(202) 544-5172 fax
Counsel for Petitioner Operation Rescue

FAY CLAYTON*
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, IL 60606
(312) 663-3100
(312) 663-0303 fax
Counsel for Respondents

**Counsel of Record*

PETITIONS FOR CERTIORARI FILED JANUARY 28, 2002
CERTIORARI GRANTED APRIL 22, 2002

155

TABLE OF CONTENTS

Page

Notation Referencing Location of Items Already Reproduced in the Appendices to the Petitions for Certiorari ii

Chronological List of Relevant Docket Entries 1

Third Amended Class Action Complaint (excerpts) 32

Pretrial Order (excerpts) 56

Order of Final Approval of Partial Settlement between Plaintiffs and Randall Terry 79

Plaintiffs' Exhibit 592 (transcript from portion of Randall Terry's videotape where he defines "rescue") 83

Plaintiffs' Exhibit 670 (3/31/86 letter from J. Scheidler to D. Pursley) (excerpts) 84

Plaintiffs' Exhibit 680 (5/21/86 letter from J. Scheidler to J. Daniel Bray) 85

Testimony of Susan Wicklund (direct) 87

Testimony of Joseph Scheidler (excerpt of cross-examination) 128

Jury Instructions Nos. 12, 20, 21, 22, 24, 25, 28, 30, 34 130

Special Interrogatories and Verdict Form 142

Order Granting Certiorari 149

The following items appear on the indicated pages in the Appendices to the Petitions for Writ of Certiorari:

Page

APPENDICES TO THE PETITION IN NO. 01-1118 (*Scheidler v. NOW*)

A. Decision of the U.S. Court of Appeals for the Seventh Circuit (Oct. 2, 2001) 1a

B. Memorandum Opinion and Order of the District Court (N.D. Ill. July 25, 1995) (dismissing and striking complaint in part) 32a

C. Memorandum Opinion and Order of District Court (N.D. Ill. July 16, 1999, entered July 28, 1999) (granting permanent injunction) 109a

D. Order of the U.S. Court of Appeals for the Seventh Circuit (Oct. 29, 2001) (denying rehearing) 142a

E. Excerpts of Hobbs Act (18 U.S.C. § 1951) and RICO (18 U.S.C. § 1964) 144a

F. Excerpts from Jury Instructions 146a

G. Jury's Special Interrogatories and Verdict Form 158a

APPENDICES TO PETITION IN NO. 01-1119 (*OR v. NOW*)

A. Decision of the U.S. Court of Appeals for the Seventh Circuit (Oct. 2, 2001) 1a

B. Decision of the U.S. Supreme Court (Jan. 24, 1994) 39a

C. Order of the Seventh Circuit (May 16, 1994) (remanding to district court) 56a

D. Memorandum Opinion and Order of the District Court (N.D. Ill. July 25, 1995) (dismissing and striking complaint in part) 61a

E. Memorandum Opinion and Order of the District Court (N.D. Ill. Sept. 23, 1997) (granting summary judgment in part) 157a

F. Minute Order of the District Court (N.D. Ill. Sept. 17, 1998) (denying remittitur and new trial) 232a

G. Memorandum Opinion and Order of District Court (N.D. Ill. July 16, 1999) (granting permanent injunction) 233a

H. Minute Order of the District Court (N.D. Ill. Aug. 5, 1999) (denying various motions) 275a

I. Judgment of the District Court (N.D. Ill. Aug. 25, 1999) 277a

J. Memorandum Opinion and Order of the District Court (N.D. Ill. Mar. 28, 2001) (denying joint Rule 60(b) motion) 283a

K. Order of the U.S. Court of Appeals for the Seventh Circuit (May 18, 2001) (consolidating appeal from Rule 60(b) Order with pending appeals) 295a

L. Order of the U.S. Court of Appeals for the Seventh Circuit (Oct. 29, 2001) (denying rehearing) 297a

M. U.S. Const. amend. I 299a

N. Hobbs Act, 18 U.S.C. § 1951 ..... 300a

O. RICO [excerpts], 18 U.S.C. §§ 1961, 1964 ..... 302a

P. Jury's Special Interrogatories and Verdict Form[1] .. 310a

[1]Juror Ostrander's first name, on page 315a. should be "Patrick," not "Patricia."

RELEVANT DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION -- NO. 86 CV 7888

Date	No.	Proceedings
10/17/86	01	COMPLAINT
* * *		
02/02/89	155	AMENDED COMPLAINT
* * *		
09/22/89	236	SECOND AMENDED CLASS ACTION COMPLAINT
* * *		
3/18/91	469	Plaintiffs' RICO case statement
* * *		
05/28/91	500	MEMORANDUM, OPINION, AND ORDER
05/28/91	501	ENTERED JUDGMENT
05/28/91	502	MINUTE ORDER of 5/28/91 before Honorable James F. Holderman: Enter memorandum opinion and order that defendants' motion to dismiss Count 1 and Counts 2-4 is granted. Due to lack

Date	No.	Proceedings
		of pendent jurisdiction Counts 5-7 are dismissed. This cause of action is dismissed in its entirety.
	* * *	
08/12/92	591	OPINION from the USCA for the 7th Circuit argued 02/19/92; decided 06/29/92.
	* * *	
10/03/94	676	CERTIFIED COPY of order from the USCA for the 7th Circuit entered 05/16/94: This cause came before the court on remand from the United States Supreme Court. It is ordered and adjudged that this cause is remanded to the District Court for further proceedings, in accordance with the decision of this court entered on this date. (USCA #91-2468)
10/03/94	677	CERTIFIED copy of Order from the USCA for the 7th Circuit Court regarding appeal (USCA #91-2468)
	* * *	
10/21/94	692	MOTION for leave to file third amended complaint

Date	No.	Proceedings
	* * *	
10/21/94	694	MINUTE ORDER of 10/21/94 by Hon. James F. Holderman : Status hearing held; continued to 12/22/94 at 10:00 a.m. Plaintiffs' motion for leave to file third amended complaint is granted.
	* * *	
10/31/94	701	AMENDED RICO case statement by Summit Women's Health, Delaware Women's Health, National Organization for Women (Attachment)
	* * *	
12/01/94	715	THIRD AMENDED CLASS ACTION COMPLAINT
	* * *	
12/13/94	728	MOTION by defendant Timothy Murphy, defendant Operation Rescue, defendant Joseph M Scheidler, defendant Pro-Life Action League for clarification, and/or reconsideration of court's orders of 10/21/94
	* * *	
02/07/95	758	MEMORANDUM, OPINION, AND ORDER

Date	No.	Proceedings
02/07/95	759	MINUTE ORDER of 2/7/95 by Hon. David H. Coar: For the reasons stated in the memorandum opinion entered this date. It is hereby ordered that defendants' motion for clarification and reconsideration of the order of 10/21/94 and defendant Wojnar's motion for reconsideration and clarification of the 10/21/94 order are denied.
* * *		
02/22/95	776	MOTION by defendants Randall A. Terry, Project Life, Operation Rescue to dismiss the third amended complaint
* * *		
03/02/95	787	MOTION by defendant Joseph M Scheidler to dismiss the third amended class action complaint
* * *		

Date	No.	Proceedings
03/14/95	792	RESPONSE by plaintiffs' Nat'l Organ. for Women, Delaware Women's Health, Summit Women's Health to motion to dismiss plaintiffs' amended complaint [784-1], motion to dismiss the third amended class action complaint [787-1], motion to dismiss the third amended complaint [776-1], motion to dismiss plaintiffs' third amended class action complaint [774-1], motion to dismiss count V of plaintiffs' third amended complaint for lack of jurisdiction [768-1], motion in the alternative to dismiss count V of plaintiffs' third amended complaint with prejudice for failure to state a claim upon which relief can be granted [768-2]
* * *		
07/25/95	835	MEMORANDUM, OPINION, AND ORDER
07/25/95	836	MINUTE ORDER of 7/25/95 by Hon. David H. Coar: Granting motion to dismiss count V of plaintiffs' third amended complaint for lack of jurisdiction [768-1] or in

Date	No.	Proceedings
		the alternative to dismiss count V of plaintiffs' third amended complaint with prejudice for failure to state a claim upon which relief can be granted [768-2]. Denying motion to dismiss plaintiffs' third amended class action complaint [774-1]. Denying motion to dismiss the third amended complaint [776-1]. Granting motion to dismiss plaintiffs' third amended complaint [784-1]. Motion to dismiss the third amended class action complaint [787-1] is denied. (See reverse of minute order)
		* * *
02/02/96	875	MOTION by plaintiffs Nat'l Organ. for Women, Delaware Women's Health, Summit Women's Health for class certification
02/02/96	876	MEMORANDUM by Nat'l Organ. for Women, Delaware Women's Health, Summit Women's Health in support of plaintiffs' motion for class certification
		* * *

Date	No.	Proceedings
03/05/96	879	ANSWER to third amended complaint by defendants Randall A. Terry, Operation Rescue, Project Life
		* * *
03/13/96	885	ANSWER by defendants' Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League to plaintiffs' third amended class action complaint
		* * *
01/21/97	977	MOTION by Randall A. Terry, Pro-Life Action League, Operation Rescue for summary judgment (Exhibits)
		* * *
03/28/97	1004	MEMORANDUM, OPINION, AND ORDER
03/28/97	1005	MINUTE ORDER of 3/28/97 by Hon. David H. Coar: For the reasons set forth in the attached Memorandum Opinion and Order, plaintiffs' motion for class certification is granted.
		* * *

Date	No.	Proceedings
09/19/97	1030	MEMORANDUM, OPINION, AND ORDER
09/19/97	1031	MINUTE ORDER of 9/19/97 by Hon. David H. Coar : For the reasons set forth in the attached Memorandum Opinion and Order, defendants' motion for summary judgment [977-1] is granted as to defendant Project Life on plaintiffs' 1962(c) and (d) RICO claims, and as to all defendants on plaintiffs' 1962(c) RICO claim to the extent that it is based on the predicate acts of murder, arson, or kidnapping. Defendants TPO's motion as to defendants Terry and OR on the remaining portions of plaintiffs' RICO claims is denied. As to defendant Migliorino's motion for summary judgment [968-1] that motion is granted as to plaintiffs' 1962(c) and (d) RICO claims and state law claims.

* * *

Date	No.	Proceedings
12/24/97	1039	OBJECTIONS by defendants Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy and Pro-Life Action League to plaintiffs' proposed voir dire & jury questionnaire and defendants' proposed jury questions
12/29/97	1040	RESPONSE by plaintiffs to the Scheidler defendants' opposition to jury questionnaire
01/05/98	1046	JOINT MOTION by parties for preliminary approval of partial settlement
01/07/98	1047	MINUTE ORDER of 1/7/98 by Hon. David H. Coar : Preliminary pretrial conference held in chambers. This court preliminarily approves the settlement between the plaintiff and defendant Randall A. Terry [1046-1]. Notice of settlement to issue by plaintiffs' counsel. Objections to the settlement to be submitted by 2/9/98. Hearing on any objections set for 2/18/98 at 9:45 a.m.

Date	No.	Proceedings
		Scheidler defendants are given to Tuesday, 1/13/98 by 12 Noon to file documents pertaining to the pretrial order.
	* * *	
01/08/98	1044	TRIAL brief by plaintiffs
	* * *	
01/20/98	1063	OPPOSITION by plaintiffs to defendant Operation Rescue's motions in limine to exclude testimony regarding shootings of abortion clinic physicians or personnel [1056-1]
	* * *	
01/20/98	1067	MEMORANDUM IN RESPONSE by plaintiffs to defendant Operation Rescue's motion in limine to exclude admissions from alleged co-conspirators under F.R.E. 801(d)(2)(e) [1058-1]
01/20/98	1068	MEMORANDUM by plaintiffs in opposition to defendant Operation Rescue's motion in limine to exclude evidence regarding non-economic injury [1054-1]
	* * *	

Date	No.	Proceedings
02/05/98	1076	TRANSCRIPT of proceedings for the following date(s): 1/7/98 Before Honorable David H. Coar
	* * *	
02/18/98	1095	ORDER of final approval of partial settlement between plaintiffs and Randall A. Terry.
02/18/98	1096	MINUTE ORDER of 2/18/98 by Hon. David H. Coar: Fairness hearing held and concluded, there being no timely filed objections, settlement between plaintiffs and Randall A. Terry is approved. Scheidler defendants' objections are overruled, request for further hearing is denied. Enter order of final approval of partial settlement between plaintiffs and Randall A. Terry.
	* * *	
02/24/98	1091	MEMORANDUM by plaintiffs in support of plaintiffs' proffer under Rule 104
	* * *	

Date	No.	Proceedings
02/25/98	1093	PROPOSED JURY INSTRUCTIONS submitted by plaintiffs
02/25/98	1094	EXHIBITS by plaintiffs to plaintiffs' proffer of evidence under Rule 104.
	* * *	
02/27/98	1101	PRE-TRIAL ORDER (Attachments).
02/27/98	1102	MINUTE ORDER or 2/27/98 by Hon. David H. Coar: Enter final pretrial order. Pretrial conference held.
	* * *	
03/02/98	1105	BRIEF by plaintiffs Nat'l Organ. for Women, Delaware Women's Health, Summit Women's Health in support of admissibility of newsletters written by PLAN leadership council members/co-defendants.
	* * *	
3/03/98	1113	MINUTE ORDER of 3/3/98 by Hon. David H. Coar: Trial began - jury.

Date	No.	Proceedings
	* * *	
03/04/98	--	SCHEDULE set on 3/4/98 by Hon. David H. Coar: Jury trial held and continue to 10:00 3/5/98.
	* * *	
03/05/98	--	SCHEDULE set on 3/5/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 3/9/98.
03/06/98	--	SCHEDULE set on 3/6/98 by Hon. David H. Coar: Rule 104 Hearing hearing held. The court preliminarily ruled on certain exhibits.
	* * *	
03/09/98	--	SCHEDULE set on 3/9/98 by Hon. David H. Coar: Due to the weather conditions, the full jury did not appear. The Court did not conduct trial proceedings, the Jury trial was continued to 10:00 3/10/98. The lawyers being present, the Court did conduct a further hearing regarding the exhibits and made oral rulings.
	* * *	

Date	No.	Proceedings
03/10/98	--	SCHEDULE set on 3/10/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 3/11/98.
	* * *	
03/11/98	--	SCHEDULE set on 3/11/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 3/12/98.
[03/12/98	--	Jury trial held and continued to 3/16/98]
	* * *	
03/16/98	1128	Jury trial held; continued to 3/17/98 at 10:00 a.m.
	* * *	
03/17/98	1129	Jury trial held; continued to 3/23/98 at 10:00 a.m.
	* * *	
03/23/98	1139	Jury trial held; continued to 3/24/98 at 10:00 a.m.
	* * *	
03/24/98	1141	Jury trial held; continued to 3/25/98 at 9:30 a.m.
	* * *	

Date	No.	Proceedings
03/25/98	--	SCHEDULE set on 3/25/98 by Hon. David H. Coar: Jury trial held and continued to 3/26/98 at 10:00. [Rule 50 motions denied.]
03/26/98	--	SCHEDULE set on 3/26/98 by Hon. David H. Coar: Jury trial held and continued to 8:15 & 10:00 a.m. on 3/30/98
	* * *	
03/30/98	1148	LIST OF EXHIBITS by plaintiffs admitted during their case in chief
	* * *	
03/30/98	--	SCHEDULE set on 3/30/98 by Hon. David H. Coar: Jury trial held and continued to 8:00 3/31/98.
03/31/98	--	SCHEDULE set on 3/31/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/1/98.
04/01/98	--	SCHEDULE set on 4/1/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/2/98.
	* * *	

Date	No.	Proceedings
04/02/98	--	SCHEDULE set on 4/2/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/6/98.
04/06/98	--	SCHEDULE set on 4/6/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/7/98.
04/07/98	--	SCHEDULE set on 4/7/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/8/98.
04/08/98	--	SCHEDULE set on 4/8/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/9/98.
* * *		
04/09/98	--	SCHEDULE set on 4/9/98 by Hon. David H. Coar: Jury trial held and continued to 10:00 4/13/98.
* * *		
04/13/98	1165	MINUTE ORDER of 4/13/98 by Hon. David H. Coar: Defendant Operation Rescue's motion to adopt certain jury instructions is granted as to proposed jury instruction murder, arson and bombing, all

Date	No.	Proceedings
		others are denied [1164-1]. Jury trial held; continued to 4/14/98 at 10:00 a.m.
* * *		
04/14/98	1169	Jury trial held; continued to 4/15/98 at 10:00 a.m.
* * *		
04/15/98	1173	JURY INSTRUCTIONS
04/15/98	1174	EXHIBIT list by plaintiffs
* * *		
04/15/98	1176	MINUTE ORDER of 4/15/98 by Hon. David H. Coar: Jury instructions given and closing arguments. Jury deliberation begin.
* * *		
04/20/98	1178	SPECIAL INTERROGATORIES AND VERDICT FORM for plaintiffs against defendants

Date	No.	Proceedings
04/20/98	1179	MINUTE ORDER of 4/20/98 by Hon. David H. Coar: Status hearing set for 9:45 am on 4/21/98. Jury trial ends. Jury verdict in favor of the plaintiffs and against the defendants.
	* * *	
06/15/98	1194	TRANSCRIPT of proceedings for the following date(s): 04/21/98, Before Honorable David H. Coar
	* * *	
06/29/98	--	SCHEDULE set on 6/29/98 by Hon. David H. Coar: Pretrial conference held.
06/30/98	--	SCHEDULE set on 6/30/98 by Hon. David H. Coar: held and continued hearing set for 10:00 7/1/98.
	* * *	
07/02/98	1232	MINUTE ORDER of 7/2/98 by Hon. David H. Coar : Preliminary injunction hearing held and concluded.
	* * *	

Date	No.	Proceedings
07/29/98	1220	MINUTE ORDER of 7/29/98 by Hon. David H. Coar: For the reasons stated on the record - motion in limine to exclude testimony regarding shootings is granted to the extent that plaintiffs are barred from introducing evidence that the defendants authorized, directed, or were otherwise involved in shootings of abortion clinic physicians and personnel [1056-1]. Denied to the extent that plaintiffs are not barred from presenting evidence of shootings related in time and place to speech and actions by or on behalf of defendants alleged to be threatening. This motion is terminated.
	* * *	
07/29/98	1226	MINUTE ORDER of 7/29/98 by Hon. David H. Coar: For the reasons stated on the record - motion in limine to exclude admissions from alleged co-conspirators is granted in part and denied in part [1058-1]. This motion is terminated.
	* * *	

Date	No.	Proceedings
07/31/98	1229	MEMORANDUM of law by plaintiffs in support of injunctive relief
	* * *	
08/31/98	1240	TRANSCRIPT of proceedings for the following date(s): 2/20/98, 3/3/98, 3/4/98, 3/5/98, 3/6/98, 3/9/98, 3/10/98, 3/11/98, 3/23/98, 3/24/98, 3/25/98, 3/26/98, 3/30/98, 3/31/98, 4/1/98, 4/7/98, 4/8/98, 4/9/98, 4/13/98, 4/14/98 (2 vols.), 4/15/98, 4/16/98, 4/20/98, 6/29/98, 6/30/98, 7/1/98, 7/2/98, 7/16/98, 7/24/98, 8/24/98 Before Honorable David H. Coar (31 vols: 1240-1 through 1240-31)
	* * *	
08/31/98	1242	TRANSCRIPT of proceedings for the following date(s): 2/27/98, 3/2/98, 3/3/98, 3/12/98, 3/16/98, 3/17/98, 4/1/98, 4/2/98, 4/6/98 Before Honorable David H. Coar (9 vols: 1242-1 through 1242-9)
	* * *	
09/11/98	1248	MOTION by defendant Operation Rescue for remittitur or, in the alternative for a new trial

Date	No.	Proceedings
	* * *	
09/17/98	1253	MINUTE ORDER of 9/17/98 by Hon. David H. Coar: Defendant Operation Rescue's motion for remittitur [1248-1], or alternatively, for a new trial [1248-2] is denied.
	* * *	
09/17/98	1256	MINUTE ORDER of 9/17/98 by Hon. David H. Coar: Scheidler defendants' oral motion for leave to join defendant Operation Rescue's motion for remittitur or alternatively, a new trial is granted. The motion for remittitur or for a new trial is denied.
	* * *	
10/02/98	1260	REPLY by plaintiffs in support of injunctive relief and treble damages
	* * *	
07/16/99	1296	INJUNCTION ORDER
07/16/99	1297	MINUTE ORDER of 7/16/99 by Hon. David H. Coar: Enter: Permanent injunction order.

Date	No.	Proceedings
07/16/99	1298	MEMORANDUM, OPINION, AND ORDER
07/16/99	1299	MINUTE ORDER of 7/16/99 by Hon. David H. Coar: For the reasons set forth in the attached memorandum opinion and order, defendants Joseph Scheidler and Operation Rescue's motion to decertify class action is denied [1267-1]. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's to amend the complaint to conform to evidence is denied. Plaintiffs' motion for phase II damage trials is denied. The court grants plaintiffs' petition for a permanent injunction to be placed upon defendants for a period of twelve (12) years. All other pending motions are denied as moot. This case is now closed [1227-1] [1264-1] [1237-1].
* * *		

Date	No.	Proceedings
08/03/99	1304	MOTION by defendant Operation Rescue for judgment as a matter of law, or alternatively for a new trial (Attachments)
* * *		
08/05/99	1309	MINUTE ORDER of 8/5/99 by Hon. David H. Coar: As set forth on the reverse side of this order, defendant Operation Rescue's motion for judgment as a matter of law or, alternatively for a new trial is denied
08/06/99	1310	NOTICE OF APPEAL by defendants Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, [Pro-Life Action League, Inc.]
* * *		
08/16/99	1312	NOTICE OF AMENDED NOTICE OF APPEAL by defendant Joseph M. Scheidler et al.
* * *		

Date	No.	Proceedings
08/20/99	1321	MINUTE ORDER of 8/20/99 by Hon. David H. Coar: Motion for leave to file corrected objections to plaintiffs' proposed judgment is granted. Status hearing held regarding the plaintiffs' proposed judgment. Objections overruled in part and granted in part. The plaintiff shall prepare a judgment order and circulate to the parties by close of business on 8/20/99. If no objections are filed to the revised judgment, the court will enter the judgment on Tuesday, 8/24/99 by 12:00 p.m.
	* * *	
08/20/99	1324	JUDGMENT in a civil case
	* * *	
08/25/99	1325	MINUTE ORDER of 8/25/99 by Hon. David H. Coar: Defendants' objection to the newly revised proposed judgment are denied. Enter Judgment Order.

Date	No.	Proceedings
08/25/99	1326	MINUTE ORDER of 8/25/99 by Hon. David H. Coar: Judgment is hereby entered in favor of the plaintiffs and against the defendants. Plaintiff Summit Women's Health Organization, Inc. have and recover from the defendants Scheidler, Scholberg, Murphy Pro Life Action, Inc. and Operation Rescue jointly and severally, the sum of $163,413.84, the jury verdict of $54,471.28 trebled under RICO with interest. Plaintiff Delaware Women's Health Organization, Inc. have and recover from same defendants jointly and severally the sum of $94,366.92, the jury verdict of $31,455.64. trebled under RICO with interest. A permanent injunction is entered. The Court shall retain jurisdiction to enforce the terms of the injunction for twelve (12) years. (Entered Judgment in a civil case). This case is closed.
	* * *	
08/26/99	1328	NOTICE OF APPEAL by defendant Operation Rescue
	* * *	

Date	No.	Proceedings
09/13/99	1337	RULE 52(b) motion by defendants Andrew Scholberg, Pro-Life Action League, Joseph M Scheidler, Timothy Murphy to alter or amend findings, and for additional findings
09/13/99	1338	MOTION by defendant Joseph M Scheidler under rule 60(b)
* * *		
09/15/99	1351	MOTION by plaintiffs for leave to file exhibits and deposition transcripts to be included in the record on appeal
* * *		
09/28/99	1354	LIST of exhibits to be included in record on appeal by plaintiff
09/28/99	1363	MINUTE ORDER of 9/28/99 by Hon. David H. Coar: Defendants' motion under Rule 60(b) is denied.
09/28/99	1364	MINUTE ORDER of 9/28/99 by Hon. David H. Coar: Defendants' post judgment motions under Rule 50(b) is denied. Defendants' motion under Rule 59 for new trial or

Date	No.	Proceedings
		judgment is denied. [Doc #1337-1] Defendants' motion under Rule 52(b) to alter or amend is denied.
09/29/99	1355	COPY of Order from the 7th Circuit. The court on its own motion, orders that these appeals are consolidated for purposes of briefing and disposition. (99-3076 and 99-3336)
* * *		
11/04/99	1373	NOTICE OF APPEAL by defendants Andrew Scholberg, Pro-Life Action League, Joseph M. Scheidler, Timothy Murphy from motion minute order [1372-1] [1363 & 1364]
* * *		
11/08/99	1375	NOTICE OF APPEAL by defendant Operation Rescue from final judgment of 08/27/99 and all other orders
* * *		

Date	No.	Proceedings
08/28/00	1406	MOTION by defendant Operation Rescue for relief from judgment
08/28/00	1408	SUPPLEMENTAL MOTION by Andrew Scholberg Rule 60(b) motion
* * *		
03/28/01	1444	MINUTE ORDER of 3/28/01 by Hon. David H. Coar: For the reasons stated in the attached memorandum opinion and order, defendants' motion for relief from judgment [1406-1] and supplemental Rule 60(b) motion [1408-1] are denied. Entered Memorandum Opinion and Order.
* * *		
04/26/01	1446	NOTICE OF APPEAL by Scheidler defendants Andrew Scholberg, Pro-Life Action League, Joseph M Scheidler, Timothy Murphy and Operation Rescue from order Memorandum Opinion and Order [1444-1], motion minute order [1444-2]
* * *		

Date	No.	Proceedings
05/21/01	1450	COPY of Order dated 05/18/01 from the 7th Circuit: It is ordered that the motion is granted, and these appeals are consolidated for purposes of disposition. Briefing in 01-2050 is suspended at this time. The court will determine at a later date whether briefing will be necessary in 01-2050. (99-3076, 99-3336, 99-3891, 99-3892, and 01-2050)
* * *		
10/31/01	1468	ORDER dated 10/29/01 from the 7th Circuit: On consideration of the petitions for rehearing and rehearing en banc filed by counsel for Defendants-Appellants Scheidler, Scholberg, Murphy & Pro-Life Action League, Inc. and counsel for defendant-appellant Operation Rescue, all members of the original panel have voted to deny the petitions for rehearing. No judge in regular, active service requested a vote on rehearing en banc. Accordingly, it is ordered that the petitions for rehearing be, and the same are hereby, denied.

Date	No.	Proceedings
* * *		
11/06/01	1471	OPINION from the 7th Circuit: Argued 09/14/00; Decided 10/02/01. (99-3076, 99-3336, 99-3891, 99-3892 and 01-2050)
11/06/01	1472	CERTIFIED COPY of order from the 7th Circuit: Affirming the decision of the District Court
11/06/01	1473	ORDER dated 10/29/01 from the 7th Circuit: It is ordered that the petitions for rehearing be, and the same are hereby, denied.
11/14/01	1474	MINUTE ORDER of 11/14/01 by Hon. David H. Coar: Status hearing held. Defendants' Rule 60(b) motions are all withdrawn. Document numbers [1460-1]; [1461-1] and [1461-2] and [1465-1] are all terminated.

II. U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NOS. 99-3076, 99-3336, 99-3891, 99-3892 & 01-2050

Date	Proceedings
09/28/99	ORDER consolidating appeals (99-3076 & 99-3336)
11/18/99	ORDER consolidating appeals (99-3076, 99-3336, 99-3891 & 99-3892)
09/14/00	ORAL ARGUMENT
05/18/01	ORDER consolidating appeal 01-2050 with pending appeals
10/02/01	OPINION
10/12/01	ORDER amending opinion
10/29/01	ORDER DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC. on behalf of themselves and all other similarly-situated clinics, Plaintiffs, v. JOSEPH M. SCHEIDLER; RANDALL A. TERRY; ANDREW SCHOLBERG; CONRAD WOJNAR; TIMOTHY MURPHY; MONICA MIGLIORINO; VITAL-MED LABORATORIES, INC; PRO-LIFE ACTION LEAGUE, INC.; PROJECT LIFE; and OPERATION RESCUE, Defendants.	Civil Action No. 86 C 7888 THIRD AMENDED CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1. This is a civil action brought pursuant to the Racketeer

Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 and state law. Plaintiffs seek declaratory and injunctive relief and damages from Defendants who have conspired, among themselves and with others through their enterprise, Pro-Life Action Network (PLAN), to engage in a pattern of racketeering activity that is designed to inflict, and that, in fact, has inflicted, injury on the business and property of women who seek the services of clinics that offer abortion and the clinics that offer those services.

2. Through PLAN, Defendants and their co-conspirators have engaged in Predicate Acts of racketeering, including: (A) acts and threats of extortion against clinic personnel, patients, suppliers of goods and services to the clinics, and others; acts and/or threats of murder against clinic personnel, including doctors, and their families; acts and/or threats of kidnaping of clinic personnel, including doctors, and their families; and acts and/or threats of arson against clinics, all chargeable under state law and punishable by imprisonment for more than one year; and (B) the unlawful taking of interstate shipments of fetal remains with intent to convert the fetal remains to their own uses, in violation of 18 U.S.C. § 659; the obstruction of interstate commerce by extortion and/or attempts and/or conspiracy to commit extortion and/or the commission and/or threat of physical violence to persons and property, all in violation of 18 U.S.C. § 1951; and travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of extortion or arson, in violation of laws of the state in which such activity was committed and/or of the United States, all in violation of 18 U.S.C. § 1952.

3. The Defendants' Predicate Acts have interfered directly with the clinics' business and property, including but not limited to business relations with patients, personnel, lessors, medical laboratories, and other providers of goods and services.

4. The Defendants' Predicate Acts have also interfered directly with patients' business and property rights, including but not limited to their contractual relations and prospective business relations with the clinics, and their right to engage in such business relations free of threat of force or violence.

5. The National Organization for Women ("NOW") sues as a representative on behalf of its women members who use or may use the services of clinics that perform abortions and other women who use or may use the services of such clinics. The Delaware Women's Health Organization ("DWHO") and the Summit Women's Health Organization, Inc. ("Summit") sue on behalf of themselves and all other similarly-situated clinics that perform abortions and that have been victim of Defendants' pattern of racketeering activity.

JURISDICTION

6. This Court has jurisdiction over the RICO claims pursuant to 28 U.S.C. § 1331. Jurisdiction is also conferred by 18 U.S.C. § 1964. This Court has supplemental jurisdiction over the state law claims pursuant to 18 U.S.C. § 1367. Plaintiffs' prayers for declaratory relief are authorized by 28 U.S.C. § 2201.

PLAINTIFFS

7. NOW is a nationwide, non-profit organization with over 250,000 members dedicated to advancing and protecting

the legal rights of women. Since its founding in 1966, NOW has had a special, ongoing concern for the rights of women to reproductive freedom. Currently, NOW is engaged in a wide variety of efforts at the local, state and national levels to ensure that women continue to have access to safe, economical abortion and family planning services. As part of NOW's Campaign for Women's Lives, NOW members serve as escorts to patients at women's health centers, such as the named Plaintiff clinics, DWHO and Summit, as well as at other clinics, including the Ladies Center, Inc., in Pensacola, Florida, to help protect them from harassment and intimidation by Defendants and others. NOW is incorporated, and has its principal place of business in Washington, D.C.

8. DWHO is a Florida corporation with its principal place of business in Wilmington, Delaware. DWHO operates a women's health center that provides abortions, counseling to help patients explore alternatives to abortion and a variety of gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education. DWHO, which opened in 1977, was the first out-patient clinic of this type in Delaware. Until 1983 it was the only such clinic in Delaware.

9. Summit is a partnership with its principal place of business in Milwaukee, Wisconsin. Summit operates a women's health center that is affiliated with DWHO and that also provides abortions, counseling to help patients explore alternatives to abortion and a variety of gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education.

10. Clinics such as DWHO and Summit provide safe, low-cost abortion services. Approximately three out of four

abortions in the United States are performed at clinics such as DWHO and Summit. A first trimester abortion performed at such clinics costs approximately two to five times less than the same procedure at a hospital.

DEFENDANTS

11. Joseph M. Scheidler is a resident of Chicago, Illinois, and has been the director of Defendant Pro-Life Action League, Inc., at all times relevant to the lawsuit. Beginning no later than 1987, he served on the leadership council of PLAN.

12. Randall A. Terry is a resident of Windsor, New York. He has been the executive director of Project Life and was the national organizer of Operation Rescue. He has engaged in an illegal conspiracy with Defendants and others in the Northern District of Illinois, and he has engaged in the planning and commission of racketeering activity in the Northern District of Illinois. Beginning no later than 1987, he served on the leadership council of PLAN.

13. Andrew Scholberg is a resident of the Northern District of Illinois and was the assistant director of Defendant Pro-Life Action League, Inc., from February 1988 until approximately 1990. He has been a featured speaker at two or more PLAN conventions. On information and belief, he is currently employed by Defendant Conrad Wojnar and/or the Des Plaines Pro-Life Women's Center.

14. Conrad Wojnar is a resident of the Northern District of Illinois. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center.

15. Timothy Murphy is a resident of the Northern District of Illinois. Murphy has been a paid employee of Defendant Pro-

Life Action League, Inc., since September 1988, and he worked as a volunteer for Pro-Life Action League, Inc., before that date. He has been a featured speaker at one or more PLAN conventions.

16. Monica Migliorino is the director of Citizens for Life in Milwaukee, Wisconsin, and she has been a featured speaker at one or more PLAN conventions. She has engaged in racketeering activity in the Northern District of Illinois, and has engaged in activities in this district, described in greater detail below, in furtherance of PLAN's conspiracy.

17. Vital-Med Laboratories, Inc., ("Vital-Med") is an Illinois corporation with its principal place of business in the Northern District of Illinois. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit and their affiliated clinics.

18. Pro-Life Action League, Inc., ("PLAL") is an Illinois corporation with its principal place of business in Chicago, Illinois. Its business consists of using racketeering activity to disrupt and close clinics that perform abortions.

19. Operation Rescue ("OR") is an unincorporated organization comprised of individuals and organizations, including PLAL, Scheidler, Terry, Scholberg, Murphy, and others. Its principal offices were originally located in Binghamton, New York. Its business consists of using racketeering activity to disrupt and close clinics that perform abortions. Through Terry and other agents and co-conspirators, OR has engaged in racketeering activity with its co-Defendants and others in the Northern District of Illinois.

20. Project Life, Inc., (the "Project") is an organization with its principal place of business in Binghamton, New York. Through PLAN, Randall Terry and other agents and co-conspirators, the Project has engaged in racketeering activity

with its co-Defendants and others in the Northern District of Illinois.

CLASS ALLEGATIONS

21. Plaintiffs DWHO and Summit bring this action pursuant to Rule 23(a), (b) (2) and (b) (3) of the Federal Rules of Civil Procedure on behalf of themselves and all other similarly-situated clinics that perform abortions in the United States. The class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class and they predominate over individual issues; the claims of the named Plaintiffs are typical of the claims of the class; the named Plaintiffs will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief and damages with respect to the class as a whole.

22. Plaintiff NOW brings this action on behalf of its women members and all other women who use or may use the services of clinics that perform abortions. The prerequisites of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure are satisfied. NOW's women members and other women who use or may use the services of clinics that perform abortions have standing in their own right; the interests NOW seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual NOW members or other women in the lawsuit. Furthermore, the ability of the class members to represent themselves is limited. The class of NOW's women

members and other women who use or may use the services of clinics that perform abortions is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class; NOW will fairly and adequately protect the interests of the class; and the Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

INTERSTATE COMMERCE

23. Clinics such as DWHO and Summit are engaged in interstate commerce.

24. A substantial portion of DWHO's patients come from states other than Delaware, and a substantial portion of Summit's patients come from states other than Wisconsin.

25. A substantial portion of medical supplies and equipment purchased by DWHO and Summit comes from out-of-state sources.

26. Since at least 1984, Defendants (except Wojnar and Vital-Med) have operated an enterprise through which they have agreed and conspired among themselves and with others to drive every clinic in the United States, such as DWHO and Summit, out of business through a pattern of racketeering activity.

27. Wojnar has conspired with these Defendants to violate RICO by driving clinics across the country out of business through a pattern of racketeering activity.

28. In pursuit of their goal to drive every clinic out of business, Defendants (except Vital-Med) have traveled throughout the country, and/or used interstate telephone lines and U.S. Mail services for the purpose of engaging in, and/or

encouraging others to participate in, their enterprise, which is devoted to the commission of racketeering activity at clinics such as DWHO and Summit.

29. Scheidler has distributed throughout the United States a manual, Closed: 99 Ways to Stop Abortion, outlining methods intended to be used to interfere with clinics such as DWHO and Summit. Scheidler's manual encourages the use of predicate acts of racketeering activity to drive clinics such as DWHO and Summit out of business.

30. Scheidler has traveled throughout the country training other persons to use racketeering activity, including but not limited to the methods outlined in Closed: 99 Ways to Stop Abortion.

31. Scheidler, Terry, Scholberg, Murphy, and Migliorino have traveled throughout the country leading efforts to shut down women's health centers such as DWHO and Summit through the use of racketeering activity.

32. Scheidler, Scholberg and Murphy use or have used Defendant PLAL to carry out their nationwide racketeering activity.

33. Terry has traveled throughout the country encouraging, organizing and training other persons to use racketeering activity, including blockades designed to stop ingress and egress to the clinics, to close clinics that provide abortion and thus force Plaintiffs to give up property rights.

34. Terry uses Defendants OR and the Project to carry out his nationwide racketeering activity.

35. Murphy and Migliorino, with the assistance of Defendants Wojnar, Scheidler and others, have stolen laboratory remains from interstate commerce and used interstate telephone communications and the mails to intimidate and harass clinics in at least six states. Migliorino has also

traveled across state lines to accomplish the theft and to convert the fetal remains to her own uses and the use of her co-conspirators.

FORMATION OF THE ENTERPRISE: PRO-LIFE ACTION NETWORK

36. From May 10 to 12, 1984, the first National Pro-Life Conference, entitled "Action for Life," was held in Ft. Lauderdale, Florida. Scheidler presented a conference workshop on "Effective Confrontation: A 'How To' of Picketing, Leafletting, Sit-ins and Blitzes." He also spoke at a "Ready for Action" rally. As part their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a Fort Lauderdale clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

37. The following month, in June 1984, Scheidler, PLAL and others met in Kansas City, Missouri, to formulate a six-month plan of national activities. The plan included so-called "blitzes" of abortion clinics in which anti-abortion "activists" were to enter the clinics to disrupt their business and to create a threatening and intimidating atmosphere at the clinics. The plan was designed to close down as many clinics across the country as possible.

38. In June 1984, co-conspirator Michael Bray participated in the arson of a women's health center in Annapolis, Maryland.

39. Throughout 1984, co-conspirators Kay Wiggins, James Simmons, Kathren Simmons, and others committed and attempted to commit numerous acts of arson against the Ladies Center in Pensacola, Florida.

40. By 1985, more than forty clinics that offered abortion

services had been the victims of arson.

41. In April 1985, Action for Life II, the Second Annual Pro-Life Activist Conference was held in Appleton, Wisconsin. At this conference, participants named their coalition of "activist" anti-abortion groups the "Pro-Life Action Network" ("PLAN"). PLAN adopted an agenda of nationally-coordinated racketeering activities, including so-called "sit-ins," to shut down the abortion industry, and pledged to create "a year of pain and fear" for anyone receiving or performing an abortion. Conference participants were greeted by a marque at the conference site that said, "Have a Blast." Many wore firecrackers, to symbolize dynamite, as lapel pins. Scheidler and PLAL participated in this national meeting.

42. On March 25,1986, Scheidler, PLAL and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in using racketeering activity to drive clinics that perform abortion out of business.

43. On March 26, 1986, these same Defendants and others went to the Ladies Center of Pensacola, Inc., a clinic in Pensacola, Florida, that performs abortions, to lead efforts to shut it down. During the course of their efforts, four of the co-conspirators, including Joan Andrews and John Burt, stormed the clinic. John Burt injured Linda Taggert, the clinic administrator, and Georgia Wilde, then-president of the Escambia County chapter of NOW. Andrews ransacked a medical procedures room, destroying surgical supplies. Both Andrews and Burt had to be subdued by the police. Both had their bail revoked after they returned to the clinic following their arrests. Both were convicted on criminal charges as a result of their actions.

44. In that same month, co-conspirator Michael Bray attempted arson at a women's health center in Baton Rouge,

Louisiana.

45. In April 1986, Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down clinics such as DWHO and to galvanize them into action.

46. On April 11, 1986, in furtherance of the nationwide effort to close down clinics that perform abortions, Defendant Scheidler unlawfully entered DWHO. Scheidler told the clinic administrator, Cathy Conner, that he had come to "case the place" because he and his followers intended to force DWHO to close. He stated that he and others intended to make Delaware the first abortion-free state in the nation. He threatened Conner with reprisals should she refuse to quit her job. Conner left her job with DWHO in the spring of 1987.

47. On April 12, 1986, Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion facilities."

48. Scheidler was arrested and charged with criminal trespass and harassment on April 12, 1986, as a result of his actions at DWHO the previous day. He was subsequently convicted and fined.

49. Later in April 1986, Scheidler and PLAL participated as organizers and workshop presenters at PLAN's third annual conference in St. Louis, Missouri. Conference participants adopted goals for the year that included changing their language to refer to clinic invasions as "rescue missions" instead of the term they had previously used, "sit-ins." The 1986-1987 PLAN Agenda called for "Days of Rescue" in June, August and December 1986, and January and April 1987. Field training for conference participants in "rescue missions" took place on Saturday, April 19, 1986, when 107 were arrested for blocking access to the Regency Park Center, a clinic in St. Louis that

performs abortions.

50. On November 28 and 29, 1986, Scheidler returned to Pensacola to demonstrate at the Ladies Center and at the home of Judge William Anderson, who had sentenced Joan Andrews for her role in the invasion of the Ladies Center in March 1986. Terry also traveled to Pensacola for the activities.

51. On Friday, November 28, 1986, several hundred anti-abortion activists conducted blockades at the Ladies Center for some four hours. Police had to order the blockaders to let cars through their picket line and onto the Ladies Center property. Seven people were arrested for refusing to move from in front of a truck. After the arrests, the remaining demonstrators moved into the street and stopped traffic. The Escambia County Sheriff's Department had to be called in to help the Pensacola Police Department maintain order.

52. On Saturday, November 29, 1986, Scheidler and others addressed a rally followed by a march to the home of Judge Anderson, where approximately one hundred protesters gathered. Scheidler went onto the porch of Judge Anderson's home and knocked on the door, but no one answered. Some demonstrators then refused to leave the porch and others left their protest signs behind. When officers began making arrests, Scheidler hurriedly left as the demonstration erupted into a confrontation with police. One officer was knocked to the ground, another was grabbed from behind by demonstrators attempting to help people who had been arrested escape from the police. An officer's radio was taken from him by a demonstrator, and demonstrators surrounded a police cruiser in which one of those arrested had been placed by officers. Once again the city police requested assistance in crowd control from the Escambia County Sheriff's Department when demonstrators refused to move away from the surrounded cruiser. Eight

people were arrested.

53. On December 14, 1986, PLAN held a mini-conference in St. Louis, Missouri, attended by Scholberg, among others. Scheidler sent a tape and received a copy of Scholberg's notes from the meeting, including the goals and guidelines adopted. The mini-conference was held in large part to discuss their concerns over public perception of the incidents on November 28 and 29, 1986, in Pensacola. Scholberg and Ryan reported to the group that Scheidler might want to distance himself from PLAN for a while.

54. The participants at the December 1986 conference agreed unanimously that one of their goals was to close down clinics that perform abortion. They set out guidelines to ensure better control of PLAN demonstrations in order to improve public perception of the "activist" anti-abortion movement, improve media relations and promote an impression of unity in their movement. Co-conspirator John Ryan was named interim leader of PLAN, and it was agreed that some kind of leadership council, including Ryan and Scheidler, should be on the agenda at the next PLAN Convention, scheduled for April 29 to May 2, 1987. The PLAN leaders agreed to meet again on January 21, 1987, in Washington, D.C.

55. From April 30 to May 2, 1987, all of the Defendants except Wojnar, Migliorino and Vital-Med took part in the annual PLAN convention in Atlanta, Georgia, including the "field training" session on Saturday, May 2, 1987. Scheidler, Terry and Scholberg were featured as speakers at the convention. Seventy-nine people were arrested during the "field training" at the Women's Health Center. A news release from Defendants before the conference stated that they would try to stop abortions at Atlanta clinics "by any and all means available. No abortion clinic will be spared." At a news

conference during the convention, Scheidler said tactics such as blocking entrances of clinics and abrasive confrontations with women seeking abortions were necessary "to take their business away from [the providers]."

56. At the 1987 PLAN convention, a leadership council of five regional representatives was elected, including Scheidler and Terry, along with John Ryan from St. Louis, Missouri, Andrew Burnett from Portland, Oregon, and Peter Lennox from Atlanta, Georgia. Ryan had been arrested numerous times for disrupting clinics by force; Burnett had been arrested at the 1986 PLAN convention field training; and Lennox had attended the PLAN mini-conference in December 1986. Both Burnett and Lennox were featured speakers at the 1987 PLAN convention. The council met during the convention and again on August 21, 1987, in Washington, D.C.

57. In December 1987, after numerous threats by Scheidler that he would close a Chicago women's health center, and after incitation by Scheidler to give that clinic "a hard time" and to "molest" it, co-conspirator Anthony Lesniewski physically assaulted a security guard at the American Women's Health Center by attempting to run him over with a vehicle.

58. From August 25 through 27, 1988, Defendant PLAL sponsored the 1988 PLAN convention in Chicago. Scheidler, Scholberg, Murphy, Migliorino, Terry, PLAL, OR, and the Project took part. Scholberg, Murphy and Migliorino were speakers. Terry also spoke to the convention on the activities of OR and was featured at a PLAN news conference on Friday, August 26, encouraging others to take part in "field training" planned for the next day. On Saturday, August 27, conference participants, including Scheidler, Murphy and others, took part in blockades at two clinics in Chicago. At one of the clinics, demonstrators used a tactic that Scheidler called a "lock and

block." Scheidler described it as a new method requiring fewer people to close a clinic. Demonstrators poured glue into the locks of the clinic's doors and locked a Kryptonite bicycle lock on the door handles. Murphy and another demonstrator also used bicycle locks, positioned around Murphy's neck and the other demonstrator's ankle, to attach themselves to a solid block of concrete, which they had placed in front of the clinic door. Sixteen people, including Murphy, were arrested in connection with the blockade of the clinic.

CARRYING OUT PLAN'S AGENDA: OPERATION RESCUE

59. Beginning no later than 1986, the PLAN Defendants and others conspired to organize massive blockades (which they called "sit-ins") and clinic invasions at abortion clinics nationwide. Their goal was physically to block access to the clinics in order to prevent patients and staff from entering or leaving and to create a threatening, intimidating atmosphere and a public image of danger in connection with the clinics. Terry presented the proposal to the other Defendants in November 1986, in Pensacola, Florida.

60. Over a period of months, the plan to blockade clinics, organized under the name "Operation Rescue," was discussed and revised. Following a visit between Scheidler and Terry in New York in March 1987, the plan was finalized and brochures were printed showing Scheidler, Scholberg and PLAL among the co-sponsors of OR.

61. The revised plan for OR was presented at the 1987 PLAN convention. The 1987-88 "direct action" schedule that came out of the convention included OR actions from April 30 through May 7, 1988, directed at clinics in the New York City

area. Field training was scheduled for Thanksgiving 1987, in St. Louis, but at the PLAN leadership council meeting August 21, 1987, in Washington, D.C., Defendants and the other organizers decided to change the location to the northeastern United States.

62. On November 28, 1987, PLAN organizers and others affiliated with them took part in an OR field training in Cherry Hill, New Jersey. Some 300 people from over a dozen states blocked access to the Cherry Hill Women's Center. Two hundred eleven people were arrested.

63. From May 2 through May 6, 1988, in violation of both state and federal restraining orders, OR conducted four days of clinic blockades in New York City and Hicksville, Long Island. Arrests totalled 503 on Monday, May 2; 423 on Tuesday, May 3; 401 on Thursday, May 5; and 320 on Friday, May 6. Scheidler served as an official marshal during the New York City siege. Scheidler and Scholberg were among those arrested. Scheidler was reported to have said he was there to see how the New York action was done, since they expected to do an OR action in Chicago as well.

64. On July 19, 1988, a series of OR actions began in Atlanta, Georgia. More than 1,200 participants were arrested during the nearly four months that the sieges continued. Felony charges were brought against Terry for inciting police assault and clinic trespass. At least thirty OR participants in Atlanta were arrested on felony charges: eight for assaulting a police officer; six for terrorist acts; and sixteen for false imprisonment.

65. In early October 1988, PLAN ended the OR actions in Atlanta as it geared up for a National Day of Rescue on October 29, 1988. For the National Day of Rescue, Terry, Scheidler, Scholberg, Murphy, PLAL, and other PLAN participants organized simultaneous OR actions in approximately forty

cities around this country and in Toronto, Canada, blockading clinics and prompting nearly 2,500 arrests.

66. In addition to the nationally-coordinated OR actions discussed above, local OR actions have taken place almost continuously since the November 1987, activity in Cherry Hill, New Jersey. More than 10,000 participants have been arrested in OR actions since that time.

* * *

COUNT I: RICO § 1962(c)

82. This Count is brought against all Defendants except Vital-Med and Wojnar. Scheidler, Terry, Scholberg, Murphy, Migliorino, PLAL, OR, and the Project are referred to as the "1962(c) Defendants."

83. PLAN is an enterprise under 18 U.S.C. § 1961(4), engaged in and affecting interstate commerce. PLAN is an association of individuals and groups with the common purpose of using racketeering activity to drive all clinics that provide abortion services out of business. PLAN is wholly distinct from the pattern of racketeering activity engaged in by each Defendant.

84. Scheidler, Terry, Scholberg, Murphy, and Migliorino, each persons under 18 U.S.C. § 1961(3), are associated with PLAN by virtue of their involvement in its annual conventions as speakers and in other capacities. Defendants Scheidler and Terry are also associated with PLAN by virtue of their positions on its leadership council.

85. PLAL, OR and the Project, each a person under 18 U.S.C. § 1961(3), are associated with PLAN and are among its member groups. In addition, they are associated with PLAN

through the roles played by their current or former directors, Scheidler and Terry, in PLAN.

86. Each of the 1962(c) Defendants conducted and participated in the conduct of PLAN's affairs through a pattern of racketeering activity. The predicate acts comprising the pattern of racketeering activity include but are not limited to those acts described in paragraph 87 below. The 1962(c) Defendants conspired to, attempted to or did wrongfully use their pattern of racketeering activity to injure the business and property of the Plaintiffs.

87. The 1962(c) Defendants have committed the following Predicate Acts, among others:

A. Attempts, conspiracies to commit and commission of extortion against the Women's Awareness Clinic, its employees, doctors, patients, and prospective patients in Ft. Lauderdale, Florida, by persons attending the 1984 National Pro-Life Conference, at which Scheidler presented a workshop, in violation of Fla. Stat. Ann. § 836.05, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

B. Conspiracy and threats to commit extortion by Scheidler and others associated with him as part of their participation in the 1985 PLAN Conference against anyone receiving or performing an abortion, in violation of state extortion laws, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

C. Conspiracy to commit extortion by persons attending a March 25, 1986, workshop led by Scheidler and others associated with Defendants in Pensacola, Florida, which organized co-conspirators to attempt or use extortion and/or physical violence to drive the Ladies Center and similar clinics out of business, in violation of Fla. Stat. Ann. § 836.05, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

D. Extortion, attempted extortion and the commission

of physical violence against clinic personnel and others on March 26, 1986, when John Burt physically injured the president of the local NOW chapter, the clinic administrator and others in the course of efforts by Scheidler, PLAL and others associated with them to shut down the Ladies Center and other clinics through extortion and/or physical violence, in violation of Fla. Stat. Ann. § 836.05, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

E. The destruction of medical supplies by co-conspirator Joan Andrews on March 26, 1986, in the course of efforts by Scheidler, PLAL and others associated with them to shut down the Ladies Center and other clinics and in furtherance of a plan to commit extortion by using threatened or actual force or violence to induce the Ladies Center's and other clinics' employees, doctors, patients, and prospective patients to relinquish their property rights, in violation of Fla. Stat. Ann. § 836.05, 18 U.S.C. § 1951 and 18 U.S.C. 1952;

F. Attempts, conspiracies to commit and commission of extortion against the Regency Park Center, its employees, doctors, patients, and prospective patients in St. Louis, Missouri, by persons attending the 1986 PLAN Conference, in which the 1962(c) Defendants participated as organizers and workshop presenters, in violation of Mo. Code. Ann. § 570.030, 18 U.S.C. 1951 and 18 U.S.C. § 1952;

G. Attempted and actual extortion by Defendant Scheidler on April 11, 1986, when Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic, in violation of D.C. Code Ann. §§ 22-3851 and 22-2307, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

H. Attempts, conspiracies to commit and commission

of extortion against the Women's Health Center, its employees, doctors, patients, other clinics and prospective patients in Atlanta, Georgia, by the 1962(c) Defendants and others attending the 1987 PLAN Conference, in violation of Ga. Code Ann. § 16-8-16, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

I. Attempts, conspiracies to commit and commission of extortion and/or physical violence at a series of OR actions, including:

(1) A "field training" action on November 28, 1987, and continuous actions since then directed at the Cherry Hill Women's Center in Cherry Hill, New Jersey, in which Terry, OR, the Project, and others associated with them blocked access to the clinic, among other unlawful actions, in violation of N.J. Stat. Ann. §§ 2C:20-2 and 2C:20-5, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

(2) Four days of blocking the entry to clinics in New York City and Hicksville, Long Island, from May 2 to May 6, 1988. Terry was an organizer and Scheidler served as official marshal for the New York action. Terry, Scheidler and other PLAL employees were among those arrested at the New York actions. These acts violated New York Penal Law § 155.05(e), 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

(3) Nearly four months of forcible and/or violent actions, beginning July 19, 1988, directed against clinics in Atlanta, Georgia. More than 1,200 participants in these actions, including Terry and others associated with him, were arrested for charges including inciting police assault, assaulting a police officer, terrorist acts, false imprisonment, and trespass. These acts violated Ga. Code Ann. § 16-8-16, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

(4) A forty-city "National Day of Rescue" on October 29, 1988, organized by Terry, Scheidler, PLAL, OR, the Project, and others associated with them to block access to clinics and force or attempt to force clinics to close, in violation of state extortion laws, 18 U.S.C. § 1951 and 18 U.S.C. § 1952;

* * *

88. Each of the Predicate Acts obstructed, delayed and/or affected interstate commerce insofar as it succeeded, and many of the Predicate Acts involved travel in interstate commerce by the Defendants and/or their co-conspirators with the intent to commit crimes of violence to further acts of extortion and/or to promote extortion, in violation of state and/or federal laws.

89. Each violation of 18 U.S.C. § 1962(c) directly and proximately injured the business and/or property interests of the Plaintiffs and the class members.

90. Specifically, Defendants' racketeering activities have decreased the business of and/or increased the cost of doing business at DWHO, Summit and similarly-situated clinics. The Defendants' activities have injured the Plaintiff class of NOW's women members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to engage in business relationships with the clinics, to reap the economic and medical advantages of having that choice and to enter into such relationships free of threat of force or violence.

91. Defendants' Predicate Acts are calculated to and, insofar as they have been successful, do: induce clinic personnel to give up their jobs and doctors their economic right

to practice medicine.

WHEREFORE, Plaintiffs ask that this Court certify this case as a Plaintiffs' class action; grant injunctive relief to the class of women and the class of clinics, enjoining Defendants and their co-conspirators from further racketeering activity; award Plaintiffs DWHO and Summit and the class of clinics treble damages, to be proved at trial, along with costs and attorneys' fees; and grant all other relief to which Plaintiffs may be entitled.

COUNT II: RICO § 1962(d)

92. This Count is brought against all Defendants except Vital-Med. Plaintiffs reallege paragraphs 1 through 91 above.

93. Each of the Defendants (except Vital-Med) agreed with each other and other persons to conduct and/or participate in the conduct of the affairs of PLAN through a pattern of racketeering activity. Each of these Defendants further agreed to the commission of two or more predicate acts through which each would conduct and/or participate in the conduct of PLAN's affairs, in violation of 18 U.S.C. § 1962(d).

94. As a direct and proximate result of Defendants' conspiracy in violation of 18 U.S.C. § 1962(d), Plaintiffs have been injured in their business and/or property, as alleged in paragraphs 89-91 above.

WHEREFORE, Plaintiffs ask that the Court certify this case as a Plaintiffs' class action; grant injunctive relief to the class of women and the class of clinics, enjoining Defendants and their co-conspirators from further racketeering activity and conspiracy to commit racketeering activity; award Plaintiffs DWHO and Summit and the class of clinics treble damages, to be proved at trial, along with other costs and attorneys' fees;

and grant all other relief to which Plaintiffs may be entitled.

* * *

/s/ Fay Clayton
Fay Clayton
Susan Valentine
Judi A. Lamble
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive; Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Lowell E. Sachnoff
Jack L. Block
SACHNOFF & WEAVER , LTD.
30 South Wacker Drive; Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Alan M. Pollack
POLLACK & GREENE
757 Third Avenue
New York, New York 10017
(212) 421-5300

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)
Plaintiffs,	) No. 86 C 7888
v.	) Judge Coar
JOSEPH M. SCHEIDLER, et al.,	) Magistrate Judge Lefkow
Defendants.	)

PRETRIAL ORDER

This matter having come before the Court at a pretrial conference held pursuant to Rule 16, Fed. R. Civ. P., and Plaintiffs being represented by Fay Clayton, Judi A. Lamble and Sara N. Love of Robinson Curley & Clayton, P.C., 300 South Wacker Drive, Suite 1700, Chicago, Illinois 60606, (312) 663-3100, and Alan M. Pollack of Pollack & Greene, 757 Third Avenue, New York, New York 10017, (212) 421-5300, and Lowell E. Sachnoff and Jack L. Block of Sachnoff & Weaver, Ltd., 30 South Wacker Drive, Suite 2900, Chicago, Illinois 60606, (312) 207-1000; and Defendants Joseph M. Scheidler, Timothy Murphy, Andrew Scholberg and the Pro-Life Action League being represented by Thomas Brejcha, 185 North Wabash Avenue, Suite 1207, Chicago, Illinois 60601, (312) 782-1680, and Defendants Randall A. Terry and Operation Rescue being represented by Larry L. Crain, 101

Westpark Drive, Suite 205, Brentwood, Tennessee 37027, (615) 376-2600, the following actions were taken:

1. This is a civil action brought by the National Organization for Women, Inc. ("NOW") on behalf of its members and women who are not members of NOW and whose rights to the services of women's health centers in the United States at which abortions have been performed have or will be interfered with by Defendants' unlawful activities, and two named women's health clinics, the Delaware Women's Health Organization ("DWHO") and Summit Women's Health Clinic ("Summit"), on behalf of themselves and all similarly-situated clinics that perform abortions in the United States. Plaintiffs allege violations of the Racketeer-Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and conspiracy to violate RICO, 18 U.S.C. § 1962(d). In addition, DWHO and Summit individually assert a state law claim for tortious interference with prospective economic advantage.

The class of women represented by NOW has been certified pursuant to Rule 23(b)(2), Fed. R. Civ. P. The class of clinics represented by DWHO and Summit has been certified pursuant to Rules 23(b)(2) and (3), Fed. R. Civ. P. NOW also represents its women members under the principles announced in Hunt v. Washington Apple Advertising Council, 432 U.S. 333 (1977); see also NOW v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995).

The jurisdiction of the Court over the RICO claims is invoked under 28 U.S.C. § 1331 and 18 U.S.C. § 1964. The Court has supplemental jurisdiction over the state law claim pursuant to 18 U.S.C. § 1367. Plaintiffs' prayers for declaratory relief are authorized by 28 U.S.C. § 2201. Jurisdiction is not disputed.

2. The following stipulations and statements were submitted and are attached to and made part of this Order:

A. An agreed statement of uncontested facts, which will become a part of the evidentiary record in the case and which may be read to the jury by the Court or any party (Exhibit A);

B. An agreed statement of the contested issues of fact and law (Exhibit B) and the parties' respective statements of the contested issues of fact and law not agreed to (Exhibits C and D);[1]

C. Except for rebuttal exhibits, schedules in the form required by the local rules of the United States District Courts for the Northern District of Illinois (Exhibits E, F and G) of:[2]

(1) all exhibits (marked for identification before trial), including documents, summaries, charts and other items expected to be offered in evidence; and

(2) any demonstrative evidence to be offered during trial;

D. Lists of the names and addresses of the potential witnesses each party will call and the potential witnesses each party may call, excluding rebuttal witnesses, with a statement of any objections to calling, or to the qualifications of, any witness identified on the lists (Exhibits H, I and J);

E. Stipulations or statements setting forth the qualifications of each expert witness in such form that the statement can be read to the jury at the time the expert

[1]Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League (the "Scheidler Defendants") have neither objected to the Plaintiffs' statement nor offered any of the required statements on their own.

[2]The Scheidler Defendants have failed to make any objections to Plaintiffs' exhibits. The objections of Operation Rescue were not served on Plaintiffs until 3:42 p.m. on January 6, 1998, and thus Plaintiffs have not had an opportunity to prepare a reply.

witness takes the stand (NOT APPLICABLE; the parties do not expect to call any expert witnesses at trial);

F. A list of all portions of depositions to be read into evidence and statements of any objections thereto (Exhibits K, L and M);

G. An itemized statement of special damages (Exhibit N);

H. Waivers of any claims or defenses that have been abandoned by any party (NONE);

I. Because this is a jury trial:

(1) trial briefs (submitted separately by the parties);

(2) a set of jury instructions, verdict forms and special interrogatories agreed to by Plaintiffs and Operation Rescue[3] (Exhibit O), some additional jury instructions proposed by Plaintiffs (Exhibit P), and some additional jury instructions proposed by Operation Rescue, together with Plaintiffs' objections thereto (Exhibit Q); and

(3) a list of the questions that the Plaintiffs and Operation Rescue request the Court to ask prospective jurors in accordance with Rule 47(a), Fed. R. Civ. P. (Exhibit R);

J. A statement summarizing the history and status of settlement negotiations, indicating whether further negotiations are ongoing and likely to be productive (Exhibit S);

K. A statement that each party has completed discovery, including the depositions of expert witnesses (Exhibit T);

L. Subject to full compliance with all the procedural requirements of local General Rule 12(k), all motions *in limine* will be filed separately by the parties. Any briefs in

[3]The Scheidler Defendants have failed to propose any jury instructions, nor have they objected to any of the jury instructions that were served on them on December 6, 1997.

responses due by January 15, 1998, and replies due by January 22, 1998.

3. Plaintiffs and Operation Rescue anticipate trial of this case will take two to three weeks. The trial will commence on March 2, 1998.

4. This is a jury trial. *6 & 4 DHC*

5. The parties recommend that twelve jurors and two alternates be selected at the commencement of the trial.

6. The parties do not agree that the issues of liability and damages of the class member clinics should be bifurcated for trial.

7. The parties do not consent to this case being reassigned to a magistrate judge for trial.

8. This Order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

9. The possibility of settlement of this case was considered by the parties.

Date: FEB 27 1998

/s/ David H. Coar
Honorable David H. Coar

/s/ Fay Clayton
One of Plaintiffs' Attorneys

Fay Clayton
Judi A. Lamble
Robert L. Margolis
Sara N. Love
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive; Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Alan M. Pollack
POLLACK & GREENE, L.L.P.
757 Third Avenue
New York, New York 10017
(212) 421-5300

Lowell E. Sachnoff
Jack L. Block
Kerry Miller
Lisa Krasberg
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive; Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Miriam G. Bahcall
Rawn H. Reinhard
UNGARETTI & HARRIS
Three First National Plaza; Suite 3500
Chicago, Illinois 60602-4283
(312) 977-4400

Dalya Khan
919 Third Avenue
New York, New York 10022
(212) 735-3000

/s/ Larry L. Crain
One of Defendants' Attorneys

Thomas Brejcha
185 North Wabash Avenue; Suite 1207
Chicago, Illinois 60601
(312) 782-1680

Larry L. Crain
101 Westpark Drive; Suite 205
Brentwood, Tennessee 37027
(615) 376-2600

[TAB A]

STATEMENT OF UNCONTESTED FACTS

1. The National Organization for Women, Inc. ("NOW") is a non-profit organization with over 250,000 members nationwide, whose stated purpose is to advance and protect the legal rights of women.

2. The Delaware Women's Health Organization ("DWHO") is a Florida corporation with its principal place of business in Wilmington, Delaware.

3. Summit Women's Health Organization ("Summit") is a partnership with its principal place of business in Milwaukee, Wisconsin.

[TAB B]

AGREED STATEMENT OF CONTESTED ISSUES OF FACT AND LAW

Count I -- 18 U.S.C. § 1962(c)

1. Whether PLAN is an enterprise under RICO.

2. Whether PLAN engaged in, or its activities affected, interstate commerce.

3. Whether each of the Defendants was associated with PLAN.

4. Whether each of the Defendants is a "person" under 18 U.S.C. § 1961(3).

5. Whether each of the Defendants conducted or participated in the conduct of PLAN's affairs by participating in the operation or management of PLAN in such a way, directly or indirectly, as to have played some part in directing PLAN's affairs.

6. Whether Defendants' commission of predicate acts constitute violations of the Hobbs Act, 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 659, and/or constitute acts, threats, attempts, or conspiracies to violate state laws of extortion, arson, or murder under RICO.

7. Whether PLAN operated through a pattern of racketeering activity.

8. Whether each of the Defendants participated in PLAN's affairs through a pattern of racketeering activity.

9. Whether Plaintiffs, including the class member clinics and the women who sought abortions from those clinics, were proximately injured in their business or property as a result of any of the acts in Factual Issue No. 4 above.

10. Whether PLAN's co-conspirators included the persons listed in the Plaintiffs' Amended RICO Case Statement or any of them (also listed in PX-4).

Count II -- 18 U.S.C. § 1962(d)

11. Whether each of the Defendants agreed among themselves or with any of their co-conspirators to participate, directly or indirectly, in PLAN's affairs through a pattern of the racketeering acts.

12. Whether PLAN's co-conspirators included the persons listed in the Plaintiffs' Amended RICO Case Statement or any of them (also listed in PX-4).

Scheidler Defendants' Eleventh Affirmative Defense -- Unconstitutionality of Nationwide Injunctive Relief

13. Whether the injunction Plaintiffs seek restrains legitimate speech so as to constitute an unconstitutional prior restraint.

Scheidler Defendants' Thirteenth Affirmative Defense and Terry Defendants' Seventh Affirmative Defense -- Res Judicata and/or Collateral Estoppel As Against Plaintiffs Other Than NOW

14. Whether the claims of Plaintiffs other than NOW are barred by res judicata or collateral estoppel.

Scheidler Defendants' Twenty-Second Affirmative Defense and Terry Defendants' First Affirmative Defense -- First Amendment Protection

15. Whether Defendants' expressive activities are entitled to First Amendment protection.

[TAB C]

PLAINTIFFS' STATEMENT OF CONTESTED ISSUES OF FACT AND LAW

RICO

1. Whether, among other activities, NOW members serve as escorts to patients at women's health centers where abortions are performed.

2. Whether DWHO operates a women's health center that provides abortions, counseling to help patients explore alternatives to abortion, and gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education.

3. Whether Summit operates a women's health center affiliated with DWHO, and also provides abortions, counseling to help patients explore alternatives to abortion, and a variety of gynecological services.

4. Whether Women's health clinics where abortions are performed, such as DWHO and Summit, are engaged in interstate commerce.

5. Whether Joseph M. Scheidler is a resident of Chicago, Illinois, and has been the Director of the Pro-Life Action League, Inc. ("PLAL") at all times relevant to the lawsuit. Scheidler has attended all of the annual conventions of the Pro-Life Action Network ("PLAN"), and has been a featured speaker at each of those conventions. Scheidler and/or the PLAL have organized three or more of the PLAN conventions. Beginning no later than 1987, Scheidler served on the leadership council of PLAN.

6. Whether Andrew Scholberg is a resident of Chicago, Illinois, and was the Assistant Director of the PLAL from February 1988 until approximately 1990. Scholberg attended PLAN conventions in 1987, 1988, 1989, 1990, 1991, 1992, and 1996. He was a featured speaker at the 1987, 1988, 1989, and 1991 PLAN conventions.

7. Whether Timothy Murphy resides in the Chicago metropolitan area. Murphy has been a paid employee of PLAL since September 1988, and before then served as a volunteer. Murphy attended PLAN conventions in 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1996, and 1997. He was a featured speaker at the 1988, 1990, 1991, and 1992 PLAN conventions.

8. Whether PLAL is an Illinois corporation with its principal place of business in Chicago, Illinois.

9. Whether Randall A. Terry is a resident of Windsor, New York. He has been the National Director of Operation Rescue. Beginning no later than 1987, Terry served on the Leadership Council of PLAN.

10. Whether Operation Rescue ("OR" or "ORN") is an unincorporated organization with mailing addresses in Binghamton, New York, and Dallas, Texas, among other places. Beginning in approximately 1990, Operation Rescue adopted the name "Operation Rescue National," and began to use that name as well as "Operation Rescue."

11. Whether, among OR's sponsors are the following organizations and individuals: PLAL and Scheidler; the Pro-Life Direct Action League and John Ryan; Advocates for Life and Andrew Burnett; the Life and Family Center and Andrew Scholberg; the Prolife Nonviolent Action Project and Thomas Herlihy, Michael McMonagle and John Cavanaugh-O'Keefe.

12. Whether, from May 10-12, 1984, Scheidler and others participated in a conference entitled "Action for Life" in Fort

Lauderdale, Florida. Scheidler presented a workshop at the conference. In connection with the conference, a Fort Lauderdale clinic was surrounded, and its entrances and exits were blocked.

13. Whether, in June 1984, Scheidler, PLAL and others met in Kansas City, Missouri, where "blitzes" of abortion clinics were discussed. Following that meeting, on June 9, 1984, Scheidler and about 200 others participated in a blockade of the Planned Parenthood clinic in Kansas City, Missouri, that succeeded in closing the clinic and had the effect of closing four other clinics in the Kansas City area.

14. Whether, on July 21, 1984, Scheidler and others, in an event sponsored by PLAL, entered the Biogenetics clinic in Chicago, Illinois, and obstructed the entrance to examination rooms, in some cases by handcuffing themselves to heating pipes.

15. Whether, in April 1985, the Second Annual Pro-Life Activist Conference, "Action for Life II," was held in Appleton, Wisconsin. A marquee at the conference site said "Have a Blast." At this conference, the attendees gave the network of anti-abortion activists the name "Pro-Life Action Network" ("PLAN").

16. Whether, on March 25, 1986, Scheidler and PLAL participated in a workshop in Pensacola, Florida. The next day, Scheidler and PLAL were present at an event at the Ladies' Center, a Pensacola clinic where abortions are performed, during which others who had attended the March 25 workshop, including Joan Andrews and John Burt, invaded the clinic.

17. Whether, on April 11, 1986, Scheidler entered the DWHQ clinic without permission and made a threat to the clinic administrator; he made additional threats publicly thereafter.

18. Whether, later in April 1986, Scheidler and PLAL participated in the Third Annual PLAN Convention in St. Louis, Missouri. Clinic blockades, referred to as "rescues" or "sit-ins," were planned at the convention.

19. Whether, on April 19, 1986, in connection with the PLAN convention, a St. Louis, Missouri, clinic that performs abortions was blockaded. In November 1986, Scheidler, Terry and Scholberg attended a meeting of anti-abortion activists and participated in a blockade of the Ladies' Center in Pensacola, Florida. Shortly thereafter, Terry, Scheidler, Scholberg, and others met to discuss the forming of Operation Rescue.

20. Whether, on December 14, 1986, a PLAN mini-conference was held in St. Louis, Missouri, attended by Scholberg and others.

21. Whether, from April 30, to May 2, 1987, Scheidler, PLAL, Scholberg, Murphy, and others took part in the Fourth Annual PLAN Convention in Atlanta, Georgia. Scheidler, Terry, and Scholberg spoke at the convention. Andrew Burnett and Peter Lennox also spoke at the convention.

22. Whether the Operation Rescue concept was discussed at the 1987 PLAN Convention.

23. Whether, at the 1987 PLAN Convention, a leadership council was discussed and organized. The Leadership Council met during the 1987 PLAN Convention.

24. Whether the 1987 PLAN Convention activities included the blockade of a women's health clinic in the Atlanta suburb of Chamblee, Georgia.

25. Whether, in the summer and fall of 1988, Operation Rescue conducted blockades at clinics in the Atlanta, Georgia, area.

26. Whether the Leadership Council of PLAN met on August 21, 1987, in Washington, D.C.

27. Whether, from August 25-27, 1988, Scheidler, Scholberg, Murphy, Terry, and PLAL took part in the Fifth Annual PLAN Convention in Chicago, Illinois. Terry, Murphy, Scheidler, and others spoke at the meeting.

28. Whether, on the last day of the 1988 PLAN convention, a Chicago clinic was blockaded using a tactic known as a "lock and block," in which Murphy and another co-conspirator locked themselves to concrete blocks placed in front of the clinic's entrance. Murphy was arrested in connection with this blockade.

29. Whether, from May 2-6, 1988, blockades sponsored by Operation Rescue were conducted at clinics in New York City and Hicksville, Long Island. Scheidler and Scholberg were appointed marshals of the "rescues" by the organizers. At the time, Scheidler said, in substance, that he was there to see how the New York action was done, since they expected to do a massive rescue in Chicago as well. Murphy and Terry personally participated in blocking the entrance to clinics, which succeeded in closing the clinics. Terry, Murphy, and Scholberg were among the hundreds of persons arrested during the blockades.

30. Whether, in March 1989, Scheidler participated in a blockade of the Feminist Women's Health Center in Chico, California, and was arrested.

31. Whether the Sixth Annual PLAN Convention was held in 1989 in the Detroit, Michigan, area (i.e., Livonia, Michigan). Its activities included "field training" at a women's health clinic in the area, which included a blockade of the clinic.

32. Whether the Seventh Annual PLAN Convention was held in 1990, in Jackson, Mississippi. Its activities included the blockade of a women's health clinic in the area.

33. Whether, in 1991, in Dobbs Ferry, New York, a week-long series of clinic blockades took place, which were organized by OR.

34. Whether the Eighth Annual PLAN Convention was held in Wichita, Kansas. Its activities included "field training" at women's health clinics in the area, which included blockades of the clinics. The convention was followed by an entire summer of blockades of Wichita, Kansas, clinics, where thousands were arrested. This "Summer of Mercy" was sponsored and organized by PLAN.

35. Whether the Ninth Annual PLAN Convention was held in 1992, in San Antonio, Texas. Its activities included "field exercises" at a women's health clinic in the area, which included a blockade of the clinic.

36. Whether the Tenth Annual PLAN Convention was held in 1993, in the Denver, Colorado, area.

37. Whether a meeting of persons involved in the movement to oppose abortion through the use of "direct action" was held in Lincolnwood, Illinois, in 1994.

38. Whether the PLAN convention for 1996 was held in Chicago, Illinois, from March 12-14, 1996. Convention participants discussed plans for activities, including rescues, to occur in Chicago during the 1996 Democratic National Convention.

39. Whether, during the 1996 Democratic National Convention, the Division West clinic in Chicago was blockaded. The clinic decided to forego its right to perform abortions in exchange for the blockaders to leave the premises.

40. Whether the PLAN convention for 1997 was held in Milwaukee, Wisconsin, from September 11-13, 1997. Scheidler and Donald Treshman were among the speakers.

41. Whether, in 1988, Murphy, and others removed fetal remains from the loading dock at Vital-Med Laboratories, Inc. in Northbrook, Illinois. Scheidler, Murphy, Scholberg, and others then arranged for storage of the remains for a period of time, and then for the transportation of the fetal remains to other locations throughout the country, via United Parcel Service and private car.

42. Whether the fetuses removed from Vital-Med were shipped by a network of co-conspirators to North Carolina; Milwaukee, Wisconsin; Fargo, North Dakota; Chicago, Illinois; Fort Wayne, Indiana; Wilmington, Delaware; and Tallahassee, Florida, for highly-publicized burials.

43. Whether, in news stories about the fetuses taken from Vital-Med, Scheidler stated that the fetuses had been found at a laboratory in Chicago and that they were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed." On another occasion, Scheidler confirmed publicly that the fetuses came from Vital-Med.

44. Whether approximately 700 of the fetuses originated from Summit and another Milwaukee clinic, and some originated from DWHO.

45. Whether each of the individual Defendants has been arrested and convicted for his activities at two or more women's health clinics.

46. Whether, in addition to blockades conducted in conjunction with PLAN conventions, numerous blockades took place at clinics in Milwaukee, Wisconsin (including Summit), and in Fargo, North Dakota, and Melbourne, Florida, during the class period.

47. Whether, on March 10, 1993, Dr. David Gunn was murdered by Michael Griffin outside the Pensacola Women's

Medical Center. John Burt was in the vicinity of the clinic at the time of the murder.

48. Whether, on August 20, 1993, Rachelle ("Shelly") Shannon shot and attempted to kill Dr. George Tiller outside his clinic in Wichita, Kansas.

49. Whether, on July 29, 1994, Paul Hill murdered Dr. Bayard Britton and Mr. James Barrett, and wounded Mrs. June Barrett outside the Pensacola Ladies' Center.

50. Whether numerous arsons, fire bombings and butyric acid attacks were committed against class member clinics throughout the class period.

51. Whether, from 1984 to the present, PLAN conducted activities to interfere with the business and property of the Plaintiff Clinics and their patients. Some of these included "National Days of Rescue," where clinics at multiple cities across the country were blockaded at the same time.

52. Whether the Defendants and their co-conspirators committed predicate acts in the following states: California, Colorado, Delaware, Florida, Georgia, Illinois, Kansas, Michigan, Mississippi, Missouri, New York, North Carolina, North Dakota, Oklahoma, Oregon, Texas, and Wisconsin, among others, as well as in Washington, D.C.

53. Whether each Defendant agreed that two or more of the following would be committed by persons associated with PLAN from 1984 through the present:

(1) A forcible blockade of a clinic where abortions were performed;

(2) The threat to forcibly blockade a clinic where abortions were performed;

(3) An attempt to forcibly blockade a clinic where abortions were performed;

(4) An agreement with others to forcibly blockade a clinic where abortions were performed;

(5) The destruction of property in a clinic where abortions were performed;

(6) The threat to destroy property in a clinic where abortions were performed;

(7) The attempt to destroy property in a clinic where abortions were performed;

(8) An agreement to destroy property in a clinic where abortions were performed;

(9) The commission of physical violence against any person to prevent clinics from providing abortions;

(10) The threat to commit physical violence against any person to prevent clinics from providing abortions;

(11) The attempt to commit physical violence against any person to prevent clinics from providing abortions;

(12) An agreement to commit physical violence against any person to prevent clinics from providing abortions;

(13) The wrongful use of force, violence, or fear against clinics, their personnel, their doctors, or their patients;

(14) The threat of a wrongful use of force, violence, or fear against clinics, their personnel, their doctors, or their patients;

(15) An act of arson;

(16) A threat involving arson;

(17) A threat involving murder;

(18) The theft of fetal remains from the laboratory that performed pathology services for clinics where abortions are performed;

(19) Interstate travel and/or the use of facilities in interstate commerce with the intent to commit any of the acts listed above in this Factual Issue No. 4.

* * *

[TAB D]

DEFENDANT OPERATION RESCUE'S CONTESTED ISSUES OF LAW AND FACT

Count I - 18 U.S.C. § 1962(c).

1. Operation Rescue is an unincorporated association founded by Randall Terry in 1987. Whether this organization is a personal ministry of Randall Terry who, with the exception of a brief period in 1989, served as the Executive Director and the person solely responsible for its day-to-day operations.

2. Whether the name "Operation Rescue" was selected from a passage of scripture in the Old Testament found in the book of Proverbs at Chapter 21, verse 11, which reads: "Rescue those who are unjustly sentenced to death: do not stand back and let them die."

3. Whether, as the founder and leader ~~of~~ Operation Rescue, Randall Terry denounced the use of violent tactics in opposing abortion.

4. Whether individuals invited to participate in Operation Rescue events were asked to sign a pledge committing to non-violent and peaceful conduct.

5. Whether, in the late 1980s and early 1990s, the term "Operation Rescue" or "Rescues" became synonymous with a grass roots segment of the pro-life movement.

6. Whether, over the last decade, since 1987, there have been several pro-life groups which have used, as part of their name, "Operation Rescue." These groups and organizations had no formal ties or association (except in name only) with the Operation Rescue founded by Randall Terry.

7. Whether at no time during or after Randall Terry's involvement with Operation Rescue did he serve as a leader, organizer, board member or officer of any organization called Pro-Life Action Network.

8. Whether Operation Rescue has, throughout its existence, advocated peaceful, non-violent opposition to abortion.

9. Whether PLAN had a structure and goals which were separate and distinct from any predicate acts which formed the basis of the RICO claim.

10. Whether the Operation Rescue founded by Randall Terry in 1987 has conducted any activities since 1991.

11. Whether the defendant Operation Rescue is a "person," as that term is used in 18 U.S.C. § 1961(3).

12. Whether Operation Rescue's activities, which are alleged as a basis for any claim under 18 U.S.C. § 1962(c), are protected under the First Amendment of the United States Constitution.

13. Whether any women were "turned away" from DWHO or Summit as a result of Defendant Operation Rescue's clearly protected activity of sidewalk counseling or as a result of any blockade.[1]

[1] See NOW v. Scheidler, 1997 WL 610782 (N.D. Ill. Sept. 23, 1997), at *17, FN23.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)
	) No. 86 C 7888
Plaintiffs,	)
	) Judge Coar
v.	)
	) Magistrate Judge Lefkow
JOSEPH M. SCHEIDLER, et al.,	)
Defendants.	)

ORDER OF FINAL APPROVAL OF
PARTIAL SETTLEMENT BETWEEN
PLAINTIFFS AND RANDALL A. TERRY

In accordance with the findings and conclusions stated in the hearing on this matter on February 18, 1998, and pursuant to the Joint Motion for Preliminary Approval of Partial Settlement that has been made by counsel for the Plaintiffs and for Randall A. Terry on January 5, 1998,

IT IS HEREBY ORDERED:

1. The Court hereby approves the settlement (the "Settlement Agreement") entered into between Plaintiffs, the National Organization for Women, Inc., as representative of its women members and the certified class of its non-members, and the Delaware Women's Health Organization, Inc. and Summit Women's Health Organization, Inc., on their own behalf and on behalf of the Certified Class of clinics ("Plaintiff

Clinics"), on the one hand (the "Plaintiffs"); and Defendant Randall A. Terry ("Settling Defendant") on the other hand (collectively, the "Settling Parties"). The Court has determined that the Settlement is fair, reasonable and adequate, and in the best interests of the Certified Classes.

2. Pursuant to Paragraph 2 of the Settlement Agreement, it is hereby ordered that each side will bear its own costs and attorneys' fees with regard to the resolution of this matter between the Settling Parties.

3. Pursuant to Paragraph 3 of the Settlement Agreement, Randall A. Terry is hereby enjoined from interfering with the right of the Plaintiff Clinics to conduct their business (including but not limited to abortion), or the claimed right of women to avail themselves of the Plaintiff Clinics' services (including but not limited to abortion), by blockading the entrances by any means whatsoever; trespassing on the property of a Plaintiff Clinic; destroying or stealing the property of a Plaintiff Clinic; using violence or the threat of violence against any Plaintiff Clinic or any of its employees or volunteers, or against women who seek to use the services of such a Clinic; engaging in any other unlawful practice intended to prevent women from exercising their claimed right to have an abortion and/or prevent the Plaintiff Clinics from providing such services to women; or organizing, inciting or encouraging others to do any of the acts enumerated in this paragraph, or participating in an enterprise that engages in any of these acts (the "Acts").

4. Nothing contained in the Settlement Agreement, nor the action of the Settling Parties by entering into it, shall constitute, be construed as, or be deemed to be an admission of fault, liability or wrongdoing, or the absence of fault, liability or wrongdoing by the Settling Defendant.

5. In the event that Randall A. Terry should, at any time after the entry of this Order, engage in one of the Acts proscribed in Paragraph 3 above, he may be subject to both civil and criminal prosecution, including prosecution under the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 148, and to the reopening of this case to permit the Plaintiffs or any of them to prosecute him and seek injunctive relief from him, together with all monetary damages and legal fees and costs for the allegations that are the subject of this lawsuit. In the event that Randall A. Terry commits any of the Acts proscribed in ¶ 3 above, a judgment in the amount of $15,000.00 shall be entered against him as liquidated damages for each such act which he is found to have committed.

6. Neither this Order nor the Settlement Agreement releases or discharges any other defendant or any other individual who is or was affiliated or associated with the Settlement Defendant from liability for the conduct alleged in Plaintiffs' Third Amended Complaint.

7. Neither this Order nor the Settlement Agreement vacates, vitiates, abrogates or affects in any manner any prior judgment, decision or order that has been entered against Randall A. Terry in any other case or proceeding in any federal or state court, or other tribunal; nor does it release any claims between Randall A. Terry and any Plaintiff Clinic or any member or non-member of NOW that is now pending in any other court or tribunal, whether state, federal or otherwise.

8. This Court shall retain jurisdiction over the Settlement Agreement for twelve (12) years from the date of entry of this Order to enforce its terms and conditions.

ENTER:

Dated: February 18, 1998. /s/ David H. Coar
Honorable David H. Coar
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 592 (PA 169): transcript
from portion of Randall Terry's videotape
where he defines "rescue"]

RANDALL TERRY'S DEFINITION OF "RESCUE"

"Making [a clinic] inaccessible . . . by placing our bodies around it, in it, somewhere on the premise so that [women] cannot get in . . . . Or it could include, on the stretching end, our bodies and our cars, our bodies and kryptonite locks, [or] our bodies and chains."

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 670 (PA 183) (excerpts): Joe Scheidler's letter dated March 31, 1986 to Dow Pursley (italicized material was handwritten in original)]

** * *Had a glorious time in Pensacola FL last week -- shut down an abortuary for a couple of days by dismantling the suction machine.* * * Joe*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 680 (PA 185): Joe Scheidler's letter dated May 21, 1986 to J. Daniel Bray]

PRO-LIFE ACTION LEAGUE
Joseph M. Scheidler, Director, 6160 N. Cicero Ave., Chicago, IL 60646 Office (312) 777-2900 Newsline (312) 777-2525

J. Daniel Bray
Michael Bray Defense Fund
P.O. Box 459
Bowie, MD 20715

May 21, 1986

Dear Dan,

I just read Mike's article and can't find fault with it. It's really about as basic as you can get. As you are aware I have refused to condemn the bombings and have been roundly criticized for that stand. But neither have I condoned them, and some have pointed out that this is inconsistent and not true – if you don't condemn the bombings then you do, in fact, condone them – just as we argue that if you will not condemn abortion then you are condoning it.

My answer is that some things need not be considered so serious that failure to condemn automatically implies acceptance. I consider an abortion facility to be a moral evil, with no moral right to exist. What goes on inside is so

despicable that when the abortuary ceases to function a moral good has replaced it. How it ceases to function is not as important as the fact that it has ceased. Therefore I am indifferent to the means. The loss of "real estate" is trivial compared to the loss of lives in that real estate.

But I am not doing any bombing because I have found another means of shutting down abortion facilities. We calculate that we (non-violent direction action) have closed 40 abortuaries and convinced about 12 to 18 abortionists to quit doing abortions during the past two years.

I readily admit that the thirty or so attacks on abortuaries has helped close down clinics. The list of good results that has come from the violence is clear and probably much more extensive than your tally indicates.

I am not into using "violence", and I hardly think it is violence, since it is against brick and glass and not people – partly because I believe for me to go this route would be a clear admission that I do not have confidence in the efficiency of non-violent direct action – and I still do believe non-violence is effective.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Trial testimony excerpts]

* * *

[1683]

* * *

SUSAN WICKLUND, PLAINTIFFS' WITNESS,
DULY SWORN
DIRECT EXAMINATION

BY MS. CLAYTON:

Q. Dr. Wicklund, would you please tell the jury your full name.

A. Susan Marie Wicklund.

Q. What is your profession?

A. I'm a medical doctor.

Q. Would you tell us a little bit about your background up through medical school.

A. I was born in northern Wisconsin in a very rural area. Lots of family, who are all still in the same area. Left at 18 and

worked a number of jobs around the country. Eventually went to University of Minnesota, got a degree in [1684] biology and then went on to medical school at the University of Minnesota.

Q. Where did you do your medical internship?

A. In Portland, Oregon at Oregon Health Sciences University.

Q. Would you tell us what your medical internship was in and what it included.

A. It was in OB/GYN, and I guess most importantly what it included was abortion training, and that was because I looked at residency internship programs specifically that taught how to do abortions. And it wasn't very many around the country. That's why I ended up in Portland.

Q. What do you after finishing your medical internship in Portland -- oh, in what year was that that you finished your internship?

A. In 1988.

Q. And would you tell the ladies and gentlemen of the jury what you did right after you finished that.

A. I went back to my hometown in Wisconsin and practiced medicine, general practice with another physician for about a year, a little over a year, a year and three months I guess is how long I was in Grantsburg.

Q. What was the name of the clinic and hospital that you worked in in Grantsburg?

A. Burnett General Medicine.

Q. Would you tell us a little bit about your work at that [1685] clinic and hospital.

A. It was a real small hospital. It usually had a census of 6 to 10 people in the hospital at any given time, but it was a community run and based clinic and hospital. I knew everybody. I had grown up there. A lot of the nurses I worked with were people I had gone to school with. And it was the only clinic and medical center in the whole entire county, which was a population of about 10,000 people.

One of the things that happened when I got there is that the hospital board the night before I came met and decided that they wouldn't allow me or anyone else to do any abortions at the clinic or hospital. And they did that because it was a physician that had been there for a number of years --

MR. CRAIN: I just object to the relevance of all of this.

THE COURT: I'll overrule. Go ahead.

BY MS. CLAYTON:

Q. You may continue, Dr. Wicklund.

A. The physician who was there had been performing D & C's, which is another way of saying abortion without using the

word abortion for many years. And because he hadn't called it abortion, the clinic or the community had put up with it, so to speak. But when I came, they knew I would continue doing what he had been doing as part of my entire scope of [1686] medical practice, but I would call it an abortion because I didn't want it to be perceived as bad or illegal or anything else. It was a legal safe procedure.

Q. Did you say it was legal or illegal at that point?

A. It was legal.

Q. It was legal then?

A. Yes.

Q. Now, after this hospital board had voted and imposed a rule that no more abortions would be done in the clinic, did patients continue to come to you seeking abortions?

A. Certainly. Lots of woman would come with unwanted pregnancies. Many of whom I knew or had known all my life. I had to send them to clinics in Minneapolis/St. Paul or farther, which was at least two hours for them to travel to receive services since I was not allowed to do them at that facility.

Q. What were the reasons for their need for abortions at that time?

MR. BREJCHA: Your Honor, object. Relevancy.

THE COURT: I will sustain that objection.

BY MS. CLAYTON:

Q. Tell us what kind of women came to you seeking abortion service during that period of time.

A. All kinds of women. It goes across all ages and socioeconomic barriers, educations, races. There was no [1687] stereotype.

Q. Did there come a time -- did there come a time when you, in fact, started performing abortions?

A. Yes. I had been trained and was real frustrated that they weren't allowing me to include that as part of my full medical care. So I was active in abortion rights as far as reading and talking about it, but went to a march in Washington D.C. in April of '89 with my daughter and some friends.

And during that March became motivated largely due to a speech that I heard by Molly Yard, who was then president of the National Organization of Women.

Q. What was it about Molly Yard's speech that caused you to start performing abortions?

A. Molly basically said that there are those of us --

MR. CRAIN: I object to what Miss Yard said as hearsay.

THE COURT: I'm sorry?

MR. CRAIN: I object to what Miss Yard said as hearsay.

THE COURT: I'll sustain that objection.

MS. CLAYTON: I don't think this is calling for hearsay, Your Honor, but I will rephrase the question just to make sure.

BY MS. CLAYTON:

[1688]

Q. Without actually repeating what words Miss Yard said, would you tell us what it was about her speech that caused you to feel you wanted to start performing abortions.

MR. CRAIN: Same objection.

MS. CLAYTON: It's not being offered for the truth of the matter, Your Honor.

THE COURT: I'm going to sustain the objection on relevancy grounds. If we could move on.

BY MS. CLAYTON:

Q. Okay. Let's move on to what you did after that speech.

After you heard Miss Molly Yard give that speech in Washington -- by the way, what year was that?

A. '89, April.

Q. What did you do after you came back?

A. Because I felt a real call to do -- to use my services, what I was trained to do, I decided that I needed to find out if there was a need for more abortion providers in our area. So I made a phone call to one of the clinic directors in Minneapolis/St. Paul and asked her. And she said there was a desperate need, that there had been a lot of clinics that were not being able to stay open as many days a week as they needed to be because they didn't have enough abortion providers.

She called a meeting then of local -- local, and I'm meaning a three-state area clinic directors to come and meet [1689] me, and we all had a meeting and I found out that there was a desperate need for more abortion providers in quite a large area.

Q. Now, after going to this meeting with people who were working in the various clinics, how did you personally go about selecting the clinics that you would end up working with?

A. Because I had grown up in a rural area and knew how hard it is for people in outlying areas to receive services of any kind in medicine, that was my criteria was choosing places that were serving women and that had not many other services available.

Q. Why were you so determined to make abortion available to these woman?

A. Because it was a legal safe procedure, and I think it helped save women's lives.

Q. Now, at the clinics that you ended up assisting by providing abortion services, was counseling made available to them in

connection with their making a decision as to whether or not to have an abortion?

A. Certainly. Counseling is available at any clinic that I would work at. That's a mandatory -- or a given part of the whole procedure.

Q. Is that something that you personally required before you would work there?

[1690]

A. Absolutely.

Q. Let's talk about the clinics that you actually ended up serving.

Which was the first one that you began to work with to provide services including abortions?

A. The first clinic I started working at was Summit Women's Health in Milwaukee.

Q. And during what period of time did you work at Summit?

A. It was the summer of '89 to the fall of '92.

Q. Was Pam Clark, our clinic representative, was she there during part of that time?

A. Pam is not someone I remember from Summit. I think she worked at another facility in the Milwaukee area.

Q. During that period of time?

A. Yes.

Q. Are you aware that that Summit clinic that you worked in is one in the plaintiffs in this lawsuit?

A. Yes, I am.

Q. Let's focus on your experience there. Would you tell us what happened during the period when you went to Summit to provide abortion services.

A. Well, it was my first experience with protestors when I first got to Summit. And for a long time they didn't realize I was a physician working there because, of course, most of the physicians are male and they assumed I was another woman [1691] coming into the clinic for an abortion.

So there was the usual harassment of yelling and whatnot. Eventually it became much more intense in that there was a lot of clinic blockades. Clinic doors were blocked. People were sitting down in front of the doors preventing patients and staff and often myself from getting in to be able to go to work or to have a procedure done.

Q. On approximately how many times over the two or three years that you worked at Summit were you physically blockaded from getting into the clinic for some period of time?

A. Oh, many times. I can't put a number to it.

Q. Did you learn the names of some of the people who were either leading those blockades or participating in them?

A. Yes, I did. There was some of the people --

MR. BREJCHA: Your Honor, can we have a foundation before we rattle off a list of names.

THE COURT: Let's have a foundation.

BY MS. CLAYTON:

Q. If you can answer the question all at once before we identify the individuals, would you tell us how you learned the names of the individuals who were either physically blockading or leading the blockades that occurred at Summit.

A. The director at that time was a Joy Warfield, and sometimes I'd stand in the window upstairs and point out people and ask her who they were. Other times I would stand [1692] downstairs with some of the police officers and talk to them and ask them who various protestors were.

Q. Were there other ways that you learned the names of the protestors or the leaders of the protests?

A. Some of their publications. They have pictures of themselves, and you can identify them out front, television.

Q. Did you see some television interviews with some of the people who were blockading the clinic?

MR. CRAIN: Objection to leading, Your Honor.

THE COURT: All right. Please don't lead.

BY MS. CLAYTON:

Q. Did you see -- describe the television coverage that you are referring to.

A. Many times it would be the news. I would go back to the motel room after a night at the clinic and see on the news a cast of the people sitting down in front of the clinic. The one person that I was able to identify on the news was a woman whose first name was Monica and Matt Trewhella.

Q. You made reference to the newsletters and sources from certain of the anti-abortion forces themselves. Would you tell us whether you monitored any of their media.

A. Yes. There was a phone number that I would sometimes call just to find out what was going on or where there might be protests more at one time than another. And it was a phone number that had the voice of -- he identified himself [1693] as Joe Scheidler.

Q. Would you tell us which of the blockaders or leaders of the blockades you identified through the following sources, either seeing them interviewed on television, recognizing them from their own publications. We'll start with those two.

A. Okay. I guess the only person that would fall into that category would be Joe Scheidler.

Q. Did you later learn the name of the woman whose first name was Monica?

A. Yes.

Q. And what was her last name?

A. Migliorino.

Q. Was that the same woman who later married and took the name Miller? Do you know?

A. From the publications I understand -- I see her name hyphenated with Miller at the end.

Q. Were there any others that you came to identify?

A. Matt Trewhella.

MR. BREJCHA: Your Honor, object to the lack of specific foundation. It's just a lot of generalities.

THE COURT: If you want to make a speech, Mr. Brejcha, we'll have a side bar. If you make the objection, make the objection.

MR. BREJCHA: Lack of foundation, Your Honor.

[1694]

THE COURT: The objection is sustained. Let's have more foundation.

BY MS. CLAYTON:

Q. How did you learn the name of Miss Migliorino or Monica Migliorino Miller?

A. I learned her name through Joy Warfield.

Q. Was there any other source for learning her name?

A. Just in the publications with her name in that.

Q. Were these publications --

MR. BREJCHA: Your Honor, move to strike the identification as hearsay.

MS. CLAYTON: I'm continuing with the identification, Your Honor.

THE COURT: Go ahead. Motion's denied.

BY MS. CLAYTON:

Q. Did you see her picture and her name listed in publications of the Pro-Life Action League in Chicago?

A. I'm sorry. Would you say that again.

Q. Did you see Miss Miller or Miss Migliorino's picture in publications of the Pro-Life Action League, which was out of Chicago?

A. No.

MR. BREJCHA: Your Honor, objection, leading.

THE COURT: Please don't lead, Miss Clayton.

MS. CLAYTON: The witness said she didn't, Your [1695] Honor. I'm just trying to lay the proper foundation.

BY MS. CLAYTON:

Q. Let's focus on Mr. Scheidler --

THE COURT: Just a second, Miss Clayton. Don't lead.

MS. CLAYTON: Okay. I'll try not to, Your Honor. I was just suggesting that since the witness said no, it suggested I probably wasn't leading.

BY MS. CLAYTON:

Q. Let's focus on Mr. Scheidler.

THE COURT: It's leading whether the answer is yes or no. Don't lead.

MS. CLAYTON: Okay. I'll try to be careful with that.

BY MS. CLAYTON:

Q. Would you tell us what you saw Mr. Scheidler doing at the Summit clinic.

MR. BREJCHA: Objection, no foundation that she saw him doing anything at the Summit clinic. She recognized the name and called his phone number.

THE COURT: Just a second. Let's have a side bar.

(Side bar conference:)

THE COURT: This is the last time, Mr. Brejcha. Make your objection. Don't state your reasons. The next time you do that I am going to cite you for contempt. The [1696] rules require that an objection be argued outside of the presence of the jury, not stated for argument purposes in front of the jury. You have done that repeatedly. I have cautioned you. This is the last caution I will issue. Let's proceed.

MR. BREJCHA: Your Honor, I did not think I was violating your order. I beg the Court's pardon.

THE COURT: You are now on notice.

MR. SACHNOFF: May I ask one more question. I notice Your Honor has sustained an objection to leading after the witness has exhausted her recollection. It's my recollection of the rules of evidence that once a witness has exhausted his or her recollection it's permissible to ask a leading question.

THE COURT: Do you have some support for that? I'd like to see it. In the meantime we will proceed.

MR. BREJCHA: Your Honor, if the Court please. I don't want to do anything to cause upset to the Court. It is my duty

to state specific objections so that the grounds are clear to the Court. I want to know where the line is drawn since Your Honor's warned me about contempt.

THE COURT: Arguing -- in effect arguing the basis for the objection is improper. If the objection is irrelevant, then a simple statement of relevance. If the objection is leading, then a statement of leading. You are [1697] going much much beyond that.

MR. BREJCHA: Your Honor, in this case my objection was to lack of foundation.

THE COURT: Then simply stating lack of foundation is sufficient. If I don't understand the basis of the objection, I will ask for a side bar.

MR. BREJCHA: Understood, Your Honor.

(Before the jury:)

BY MS. CLAYTON:

Q. Miss Wicklund, you mentioned in your list of people who you've learned to identify a Joseph Scheidler. Can you identify Mr. Scheidler in the courtroom here today?

A. Yes, he's sitting over there.

MS. CLAYTON: May the record indicate that Dr. Wicklund has identified Joseph Scheidler.

THE COURT: The record will so reflect.

BY MS. CLAYTON:

Q. Would you tell us during the time you worked at Summit from 1989 to 1992 on approximately how many occasions you saw Joseph Scheidler at the Summit clinic?

MR. BREJCHA: Objection, leading, Your Honor.

THE COURT: Overruled.

THE WITNESS: Joseph Scheidler -- can I talk first about the first time that I saw him?

BY MS. CLAYTON:

[1698]

Q. We can start with the first one, yes.

A. Okay. I had come into the clinic and there had been a large protest out front. I had gotten into the back and came upstairs and was looking out the window, and there was a man all dressed in black with a bullhorn and was directing and showing people which way to -- well, I don't know if he was -- what he was doing was holding a bullhorn and then he would wave his arms.

THE COURT: Excuse me. The question was how many times. And now we are going into a description of a particular time. That's not responsive.

BY MS. CLAYTON:

Q. Let me state a new question.

THE WITNESS: Okay. There was a reason for going that way, Your Honor. I'm sorry.

THE COURT: Well --

BY MS. CLAYTON:

Q. Thank you, Dr. Wicklund. Let's start with the first question then first. If you can just tell us the number of approximately how many times you saw Joseph Scheidler at the Summit clinic altogether, your best estimation.

A. My best estimation would be between 5 and 10.

Q. Let's focus on the first occasion now. And would you tell us what you saw and what was occurring on that occasion when you saw Mr. Scheidler.

[1699]

A. There was a number of people sitting down in front of the door. And as the police would come and take them away -- identify them and take them away, then he would wave his arm and there would be more people that would come and go down in front of the door. It was obvious to me that he was directling what people's actions were in regards to blockading the doors.

He was a very -- always stayed on the other side of the street and was an intimidating -- very large man and always dressed in black or all in white. But many times after that when there was blockades and I would come in the back and they would tell me that there was a blockade going on, of course, I would --

MR. BREJCHA: Objection, Your Honor.

THE COURT: Sustain the objection.

MR. BREJCHA: Hearsay.

BY MS. CLAYTON:

Q. Let's just make sure -- we're going to take it one incident at a time. I know this is the way the law process works as opposed to the medical, so let's make sure we've covered all the details about the first incident.

A. Okay. Okay.

Q. Was there anything else about the first time you saw Mr. Scheidler that you recall specifically other than what you've already told the jury? Anything else that was going on or [1700] anything else that he was doing on that occasion?

A. No.

Q. And approximately when was that to the best of your recollection?

A. It would have been '90 or '91.

Q. And how long was the clinic blockaded on that occasion, if you can recall?

A. I remember we didn't see any patients till after noon, and we generally saw patients by 9 or 10.

Q. Let's move on to the next occasion that you recall when you saw Mr. Scheidler. Tell us what was happening on that day.

A. A similar occasion. He was dressed in white instead of black, but what was -- for me what was different about it was the number of people. There was a lot more people and other blockades going on at other clinics at the same time in the city.

Q. Now, are you able to estimate in any way how many people were in the crowd that was blockading the clinic on either the first or second occasion?

A. At least a dozen in front of the door at any given time, but there would be other people waiting that would come and block the door after it was cleared the first time. So it was kind of a wave of people that would come and go.

Q. Can you estimate how big the entire wave of people was on [1701] either the first or the second occasion.

A. 50 to 75. I don't know.

MR. BREJCHA: Objection, asked and answered.

THE COURT: Overruled.

BY MS. CLAYTON:

Q. Your best estimate is 50 to 75?

A. Yes.

Q. Was it more on the second occasion than that?

A. Yes.

Q. Can you estimate how many on the second occasion?

A. I'm not very good at estimating crowds. I'm sorry.

Q. On the other occasions when you saw Mr. Scheidler can you describe to us either specifically in the aggregate what he was doing on that occasion?

A. I can't. It became real upsetting for me to go out and watch, so I would avoid looking outside and watching. I would just concentrate on taking care of my patients.

Q. Did you ever have any advance notice that Joseph Scheidler was coming to your clinic in Milwaukee, to the clinic where you were working?

A. Yes, both through the telephone line that I would listen to and then sometimes we'd get advance warning through our clinic director.

Q. Now, the telephone line that you referred to is which telephone line, which organization or individual did that?

[1702]

A. Pro-Life Action Network.

Q. Was that the group in Chicago? Was it a Chicago number you called?

A. You know, I don't know what the area code is --

MR. BREJCHA: Objection, leading, Your Honor.

THE WITNESS: I don't know what the area code was. I'm sorry.

THE COURT: I am going to overrule the objection. Miss Clayton, please don't lead.

MR. BREJCHA: May I also add lack of foundation, Your Honor, in what she stated.

THE COURT: Overrule the objection.

BY MS. CLAYTON:

Q. Do you recall who it was that recorded the telephone line that you telephoned from time to time?

A. He always identified himself as Joe Scheidler and would say at the end thank you for calling Pro-Life Action News.

Q. And approximately how often did you dial Mr. Scheidler's Actions News?

A. A couple dozen times at least.

Q. Was there any other leader of Operation Rescue that ever came to the Summit clinic to your knowledge?

MR. BREJCHA: Your Honor, I object to the form of the question.

THE COURT: I am going to overrule the objection.

[1703]

BY MS. CLAYTON:

Q. You may answer.

A. If you ask specifically about a leader of Operation Rescue, I think Operation Rescue and Pro-Life Action Network they all seemed to be one. And so to me a leader of one is a leader of all of them. And it's hard for me to break them apart. Keith Tucci had identified himself as a leader of Operation Rescue.

MR. BREJCHA: Objection. Move to strike, lack of foundation. Hearsay.

MR. CRAIN: Move to strike.

THE COURT: I'm going to grant the motion. The jury will disregard the answer.

BY MS. CLAYTON:

Q. What was your basis for believing that Mr. Tucci was a leader of Operation Rescue?

A. Their own publications.

Q. Were those something -- how did you happen --

A. I frequently would look at the publications. We would get them at the clinic, so we would sit and look at it, and they identified him. Randall Terry was somebody that was obviously involved.

Q. Did Mr. Tucci come to the Summit clinic while you were working there?

A. I didn't see Mr. Tucci.

[1704]

Q. During the time when Joseph Scheidler was at the Summit clinic, how did his presence and the presence of the blockade affect you?

A. It's very frightening to have that many people who were obviously that angry about something that you're doing be out in front and trying to stop the entire process. It was horrifying. The only way to get in the clinic was to walk in the clinic, and there was a lot of times I'd be at a restaurant about three blocks away just sitting in the morning trying to work up enough nerve to face it and to come down and walk through the barrage of

people and listen to the shouts and wonder if there was going to be violence that day or if it was going to be kind of like a frenzy if something would happen that hadn't yet. I guess it was always real scary.

MR. BREJCHA: Your Honor, move to strike. Lack of foundation, speculative.

THE COURT: Overruled.

BY MS. CLAYTON:

Q. On those occasions was there ever physical contact between the blockaders and you or the vehicle in which you were arriving?

A. Yes. Lots of times if I came directly from the airport -- it was on a Thursday. If we had clinic on Thursday and Friday, I'd come directly from the airport on [1705] Thursday mornings in a taxi, and that often was surrounded by protestors and they would pound on the windows.

Sometimes it would be too many of them and I'd be scared enough I'd just tell the taxi driver to go. And we'd go to a different area. I'd call into the clinic or find out what was going on and wait till it calmed down, and then have them bring me back later.

Sometimes when it was on a Friday morning when I'd stayed in town at night and I'd have to walk from the hotel and just to get into the clinic was a number of times real -- a physical ordeal in that I was determined to get in the doors. It

would be people blocking, and I'd have to try to get over them or crawl around them or through them. Staff would try to hold the door open from the other side.

One time I was trying to get in the door. One of the staff was assisting me, and there was somebody else -- one of the protestors was holding my leg and screaming at me not to go in.

Q. Did you learn the name of the person --

A. That was Monica.

Q. Was there any other physical contact with your body by the protestors on these occasions?

A. There was one time when I took a taxi on a Thursday morning and had gone -- and there's a back door of the clinic and didn't see anybody, felt real relieved. Got out of the [1706] taxi, and as it left two men came from behind a van and -- first they went and ran to block the door for me to go. There was two doors actually. And as I went to the one door, they ran to it and blocked me and back and forth we played for a while.

They finally grabbed me and had me pushed up against the van they had been behind and were yelling at me to stop killing babies and that I deserved to die like the babies were dying.

Q. Did you learn the name of the man who had grabbed you?

A. One of them, and it was Matt Trewhella.

Q. Let's talk about your experience at the Appleton clinic. During what years did you perform abortion and related services at the clinic in Appleton?

A. The same period of time. From the summer of '89 to the fall of '92.

Q. Did you meet any opposition from anti-abortion protestors there?

A. Yes.

Q. Did you come to identify the leaders of those blockades?

A. The only person who was obviously a leader that I identified during a blockade there was a Norm Weslin.

Q. Do you know the group that he led?

A. He was very active in a group called the Lambs of Christ. I managed -- or was unfortunate enough to run into him later [1707] at other clinics, but at Appleton he was one that led a protest where people came and chained themselves with kryptonite locks outside the clinic doors. Chained themselves together and then to clinic building doorknobs, et cetera.

Q. When you say kryptonite locks, what kind of locks are these?

A. You know, those bicycle locks, the U-shaped bicycle locks.

Q. Is it possible to remove them -- is it possible to remove them with any ordinary equipment?

A. No. It takes a long time to remove them. You have to have special equipment, special saws. It takes a long time.

Q. Did Mr. Weslin chain himself or someone else to the clinic?

A. He was chained to the clinic and to somebody else.

Q. Did you have any other problems with the protestors while you were working at the Appleton clinic other than the kryptonite lock blocking by Norman Weslin and his group the Lambs?

A. There was constant attempts to keep me and patients from getting into the clinic in a peaceful manner. Many times I'd be met at the airport. What was most disturbing there is that I would fly from Minneapolis/St. Paul usually to Appleton airport, but sometimes I would change my flight at [1708] the last minute. And because there was protestors both in Minneapolis and in Appleton that even if I would get on a plane normally to fly to Appleton but would go to Green Bay instead, the protestors would be there waiting for me. Which said to me that the people in Minneapolis were obviously communicating with the ones in Appleton or Green Bay.

So there was -- I was being met at an airport no matter where I flew into. And I was flying under a different name so they couldn't have gotten my name that way.

Q. Did you undertake some precautions as a result of that?

A. At one point I started wearing disguises. It was real hard because if I got into a taxi at the airport, they'd surround the taxi and wouldn't let it drive away, and the driver would freak out.

It was just real hard to be myself and alone walking through it. So I started wearing disguises and wearing the types of clothes that I normally wouldn't wear and it worked for a while.

Q. Let's talk about your experience in Fargo. During what years did you work there?

A. I worked there from '89 until February of '94.

Q. Why did you choose to work at the Fargo clinic?

A. It's a very remote area. It's the only clinic in North Dakota, and they were having a real hard time finding physicians to keep it open.

[1709]

Q. Did you run into any problems delivering medical services at Fargo?

A. The same as every place else with protestors and clinic blockades and meeting at the airport.

Q. Did Mr. Scheidler --

MR. BREJCHA: Your Honor, move to strike the answer about same as everywhere else.

THE COURT: Overruled.

BY MS. CLAYTON:

Q. Dr. Wicklund, did Joseph Scheidler have any involvement in leading or participating in the protests and blockades at Fargo?

MR. BREJCHA: Object to the form of the question, Your Honor, involvement.

THE COURT: Overruled.

THE WITNESS: One of the telephone messages that was on for quite a long time actually was on Joe Scheidler's Pro-life Action News was a thing they were calling Focus on Fargo, where he was encouraging everybody to go to Fargo to stop the clinic from being open and trying to make North Dakota an abortion free state in their words.

BY MS. CLAYTON:

Q. Dr. Wicklund, just before you came on the stand I gave you a couple of documents. Would you find the one that has the Plaintiffs' Exhibit 1089 on it. This is a transcript of [1710] the Pro-life Action News hotline. It's a transcript of it for July 22nd, 23rd, 1991. And I'm going to call your attention to the second page.

MR. BREJCHA: Your Honor, may we have a second to just retrieve this.

THE COURT: All right.

THE WITNESS: Miss Clayton, I'm not sure you gave me that one.

BY MS. CLAYTON:

Q. Well, you know, if I didn't give it to you, can you read it on that little television screen.

A. Would you like me to read it out loud?

Q. We'll wait a moment until Mr. Brejcha gets one.

MR. BREJCHA: Yes, we have it, Your Honor. Thank you, Miss Clayton.

BY MS. CLAYTON:

Q. Yes. Why don't you read the highlighted portion, and then I'm going to ask you if that's one of the portions of the hotline that you heard when you are dialing up the action line.

A. "Out in Wichita, Kansas, a new Atlanta may be brewing. Reports we've been getting say that all three Wichita abortuaries were closed for a whole week while pro-lifers were there, and they now plan to stay on. Also in Fargo, North Dakota it's Focus on Fargo concentrating on the lone [1711] abortion mill in that state. Pro-life leaders are inviting activists

to visit both cities. See you there. And thank you for calling Pro-Life Action News." That's how he would say the ending.

Q. You gave a dramatic rendition of that closing salute. Is that one of the tapes that you recall hearing?

A. Yes.

Q. And why do you recall hearing that one in particular out of all of them?

A. Because I was going to Fargo to work and obviously it had a big effect on me that he was inviting people from all over the country to come to Fargo and try to close us down.

Q. Did I give you a document marked 1090. I may have given you the wrong set. I'm sorry. Let me put this one on the -- we call this little thing the Elmo. It projects the papers.

This is Plaintiffs' Exhibit 1090, and it's an Action News transcript from August 12th through 13th, 1991. And we will focus here on a section toward the bottom of the first page. Can you see that on the screen?

A. Uh-huh.

Q. I'm not going to ask you to read that one aloud, but looking it over by yourself is that another one of the hotline --

A. Yes.

Q. -- news that you heard Mr. Scheidler read or someone read [1712] for him on his hotline?

A. Yes, it is.

MR. BREJCHA: Your Honor, under 106, although the witness wasn't asked to read it --

THE COURT: You know the procedure, Mr. Brejcha. If you will notify Miss Clayton, if there are objections, I will take them up. If there are no objections, then do it through counsel.

MS. CLAYTON: Your Honor, may we have a side bar.

THE COURT: Let's have a side bar.

(Side bar conference:)

MS. CLAYTON: Mr. Brejcha wants me to read that they stopped for mass, which is the portion that was read -- well, she didn't read any of this one actually.

MR. BREJCHA: It was highlighted as such, Your Honor, without the sentence being highlighted and that's part of his report.

MS. CLAYTON: And the fact that that addresses --

MR. BREJCHA: I would ask if I could speak briefly to my request. Your Honor, the whole purpose of this is to show that there was some sort of violent or disruptive demonstration and the reference to the conduct of the demonstrators is certainly

pertinent. Since they plucked out the sentence in the beginning and the end, they should hear how he relates their conduct on that day. This is the report [1713] as it presumably was read over the Action News. And this would also obviously have an impact on her reaction, and Miss Clayton repeatedly asked her about her reaction.

THE COURT: How does the fact that he stopped for mass and had breakfast with the League director and his family in his backyard go to her reaction?

MR. BREJCHA: Well, I think the fact that there's a religious stop right in the middle of the message is something that, one, Mr. Scheidler here brought out in making his report; and two, it goes as I say to the character of the demonstrators, their peaceable nature. They stopped in the middle for a religious ceremony.

THE COURT: Well, the rule of completeness does not require that everything come in. This is being offered to show that Mr. Scheidler was visited by a group of pro-life rescuers on their way to Fargo.

MR. BREJCHA: Yes.

THE COURT: Now, what they did in the meantime is not relevant to the fact that they stopped to meet with Mr. Scheidler on their way to Fargo. It is not a matter of unfairness that this is not read. Now, you may wish to offer this as part of your case, but under Rule 106 there's no requirement that this be read. So I am going to sustain the objection to including that paragraph.

(Before the jury:)

[1714]

MS. CLAYTON: Did we get a ruling on that, Your Honor?

THE COURT: Overruled.

BY MR. SACHNOFF:

Q. At the request of the court reporter and others, you and I are both going to try to slow down a little bit, okay.

A. Okay.

Q. We're apparently both talking a bit too fast.

A. Okay.

Q. Now, after hearing Mr. Scheidler announce his Focus on Fargo on his hotline and talk about all the people coming to Fargo, which was then the last clinic that offered abortion services in the state, what did you do, if anything?

A. I talked to my family to prepare them, that it was going to be a long haul.

Q. What happened in about this time frame? Was there actually a group of people that arrived?

A. There was --

MR. BREJCHA: Objection, Your Honor, leading.

THE COURT: Overruled.

THE WITNESS: The protests in Fargo escalated all that summer. It became an ordeal to get to the clinic and trying to decide whenever I'd go there if I was going to fly or drive and which would be the safest.

In that fall the Lambs -- people identifying [1715] themselves as the Lambs of Christ had been in Fargo a lot. And then a morning in October I woke up and there -- I lived at the end of a three and a half mile dead end road on six acres of wooded land, a very small yard. The woods was real close to the house. And woke up in the morning to the shouts of people screaming Susan kills babies, and I couldn't figure out -- I thought I was dreaming.

And I wake up my husband and we looked out the window and we could see the shadows of people all around. We went to all the windows in the house. There was people everywhere outside and something in the yard. We couldn't tell what was going on, and kept the lights off, called the police. And that was the beginning of a month long siege on our house by a group that again identified themselves as the Lambs of Christ.

Q. Did you learn the names of some of the individuals who were working with that group called Lambs of Christ?

A. Norm Weslin had always been associated with that group, but the person that I saw there on occasion and also saw up in Fargo was the woman whose name is Shelley Shannon.

Q. How did you later learn that that was her name?

A. Through both television, seeing her face.

MR. BREJCHA: Your Honor, move to strike. Lack of foundation.

THE COURT: Overruled.

[1716]

BY MS. CLAYTON:

Q. You mentioned that some of these protestors were getting close to your house. Would you teli us when you can recall them surrounding your house and tell us how thoroughly they surrounded it on that occasion.

A. On that particular occasion it was people all around on our property. They had -- with the help of neighbors we figured out that they had somebody posted down at the beginning of the road, the three and a half miles, and as soon as they saw police cars coming they used cell phones to call the people by our house and have them get off the property, so they stayed at the end of the driveway then.

But about over the next month they frequently blockaded our driveway so that I couldn't get out. They would put barrels filled with cement in the driveway. And, of course, it's through woods, so it doesn't take more than four barrels across the woods so you can't get out. Interestingly enough they would let my daughter, who was in eighth grade I guess at that time, the

police would come and they'd let the police come in and pick up my daughter and take her out again to school. So she rode back and forth to school in a police car frequently.

It got where I often couldn't come home because I was afraid I wouldn't be able to get out in the morning to be able to go to work at whatever clinic I needed to get to. [1717] And my daughter became too frightened to stay at home. So my husband actually had to quit college. He had gone back to college to get a degree and had to quit fall semester because we were so frightened for our property. It was one morning we woke up, and there had been -- there was always people around, day and night.

MR. CRAIN: Your Honor, I object to the long narrative.

THE COURT: Sustain the objection. Dr. Wicklund, for reasons that are not obvious, questions and responses in this proceeding are not like a conversation.

THE WITNESS: Okay.

THE COURT: It has to be broken down into discrete questions and answers to those questions, and it's awkward sometimes but you will have to trust me on the fact that there's good reasons for doing it that way.

THE WITNESS: Okay.

THE COURT: So if you can confine your response to the specific question that's asked, it would be helpful.

MR. BREJCHA: Your Honor, I move to strike the narrative answer.

THE COURT: I'll overrule the objection.

BY MS. CLAYTON:

Q. Why don't you tell us what precautions you and your family took to deal with this situation where you were being [1718] surrounded on your very own property at your own home.

A. We had to hire security yards to watch the property. I bought a very expensive German shepherd guard dog that had been trained for personal protection. We had to have family members at the house at all times.

Q. Were there also blockades of your clinic in addition to the blockades of your home?

A. Certainly. There was blockades going on up in Fargo concurrent with the blockades of my house.

Q. Was any leader of Operation Rescue present at any of those blockades at the clinic?

A. Keith Tucci was one of the people that had come to Fargo to blockade clinics and act as a leader.

Q. Approximately when was that, if you can recall?

A. It would have been summer or fall of '91.

Q. So was that the same time period when you are listening to these hotlines that we referred to earlier?

A. Yes.

Q. Were there any volunteers who assisted you in dealing with the -- in giving you extra security while you were at Fargo?

A. Yes. There was a number of volunteers. Sometimes we had as many as 10 to 20 people outside the clinic helping us escort patients in.

Q. Where did those volunteers come from, if you know?

[1719]

A. Most of them came from the local community. Some were NOW members, some were NARAL members. NARAL is the National Abortion Rights Action League, and NOW is the National Organization of Women.

Q. Were they all women, all men, or both?

A. No. There was many men and women. Some minorities present. It was very helpful.

Q. Now, during the time you worked at these three clinics that we've discussed did you perform just abortion services?

A. No. I feel real strong about preventing unwanted pregnancies in the first place, so we provide family planning, counseling, and help to all of our patients. Besides annual

exams, breast exams, GYN -- lots of other women's services besides abortions.

MS. CLAYTON: Thank you. I have no other questions at this time.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Trial testimony excerpts]

JOSEPH M. SCHEIDLER, DEFENDANT HEREIN,
PREVIOUSLY SWORN
CROSS EXAMINATION (resumed)

[4148]

* * *

BY MS. CLAYTON:

Q. When it comes to clinics that provide medical services, including abortion, isn't it a fact that you don't want the women to use those clinics for any purpose, even for gynecological purposes unrelated to abortion?

A. That's true.

Q. And you make no effort to determine whether a woman who's seeking to enter a clinic that offers services of which abortion is one, you make no effort to determine whether she's there for other medical treatment or for an abortion, right?

[4149]

A. Well, that depends.

Q. Let me direct your attention to Volume 8 of your deposition beginning on page 1331. Beginning on line 8, isn't it a fact that you gave this answer to this question:

"Question: Have you personally ever made any effort to let women in if they indicated that they were not there seeking an abortion?"

And your answer:

"Let them in when? Usually if we were blocking an entrance, there were enough people there that one person deciding to let them in wouldn't make any difference. Besides we don't want them to go in for any service in an abortion clinic. It just keeps the abortionists in business."

That was your answer, wasn't it, Mr. Scheidler?

A. Oh, that's true, yes. I thought you meant in a building maybe where there's a clinic and there are other services.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)
	) No. 86 C 7888
Plaintiffs,	)
	) Judge Coar
v.	)
	)
JOSEPH M. SCHEIDLER, et al.,	)
	)
Defendants.	)

JURY INSTRUCTIONS
(excerpts)

[filed Apr. 15, 1998]

JURY INSTRUCTION NO. 12

Nature of the Case

This lawsuit is brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and state law. The plaintiffs seek injunctive relief and damages from the defendants who allegedly have conspired, among themselves and with others through their alleged enterprise, Pro-Life Action Network ("PLAN"), to engage in a pattern of illegal activity, which the plaintiffs contend was designed to injure the business and property of clinics where abortions are performed and to deprive women of the right to obtain the services of those clinics.

A women's right to obtain an abortion is not at issue in this lawsuit. The United States Supreme Court already has declared that women have a constitutional right to choose to have an abortion.

Nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafleting and participating in the legislative process are activities protected by the First Amendment of the United States Constitution.

What is at issue in this case is whether the defendants engaged in activities that are prohibited by RICO.

The fact that it has taken 12 years for this case to come to trial should not concern you.

JURY INSTRUCTION NO. 20

Claim I -- RICO Violation

Third Element: "Associated with" the Enterprise

Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN.

If the defendant was associated with PLAN at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with PLAN for the entire time that it existed.

JURY INSTRUCTION NO. 21

Claim I -- RICO Violation

Fourth Element: Operating or Managing an Enterprise

The plaintiffs must show that, as part of his or its association with PLAN, the defendant participated in the operation or management of PLAN or acted at the direction of PLAN's leaders. The defendant need not have been part of the top management or have held any formal position in PLAN.

JURY INSTRUCTION NO. 22

Claim I -- RICO Violation

Fifth Element: Pattern of Unlawful Activity

Plaintiffs must show that the defendant or other people associated with PLAN committed two or more unlawful acts in any of the following categories in any ten-year period:

(1) Acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic worker, or clinic;

(2) Threats of murder against a doctor, nurse, or clinic worker;

(3) Attempting or conspiring to do any of the acts listed in ¶¶ (1)-(2) above, even if the act was not actually carried out;

(4) Acts or threats of physical violence to any person or property;

(5) Travel across state lines, or use of the mails or telephone, with the intent to promote, manage or carry out any act of extortion, arson, or any crime of violence in violation of state or federal law followed by an act in furtherance of that intent;

(6) Attempting to travel across state lines, or use the mail or telephone to do acts described in ¶ (5) above; or

(7) Causing others to travel across state lines, use the mail or telephone to do or attempt acts described in ¶ (5) above.

The two or more acts may be from the same category or different categories. I will give you further explanation about some of these categories of unlawful acts in a moment.

The plaintiffs must also show that there was some connection between the acts, for example, that they happened as a result of a common scheme, plan or motive.

JURY INSTRUCTION NO. 24

Claim I -- RICO Violation

Unlawful Acts Under RICO:
Federal Law Extortion (Hobbs Act)

Plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence or fear to cause women, clinic doctors, nurses or other staff, or the clinics themselves to give up a "property right." The term "property right" means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN.

Any fear involved must be reasonable under the circumstances. Fear includes not only fear of physical violence, but fear of wrongful economic injury. Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats.

Plaintiffs must also show that the extortion of the defendant or others associated with PLAN "affected interstate commerce." (See Jury Instruction No. 19 for a definition of interstate commerce). It is sufficient if the acts of extortion were aimed

at medical facilities that purchased supplies made in another state or that served patients who came from another state.

If the defendant or someone else associated with PLAN attempted to commit such an act, it is a violation even if the act was not completed.

JURY INSTRUCTION NO. 25

Definition of a Threat

In order for the plaintiffs to establish a threat they must demonstrate that the defendants or their co-conspirators made a statement, or engaged in conduct, in a context or under such circumstances wherein a reasonable person would foresee that the statement or conduct would be interpreted by those to whom the maker communicates the statement or conduct as a serious expression of an intention to inflict harm, including bodily harm or wrongful economic harm. Context, as used in this instruction, includes the surrounding events and the reaction of the listeners.

Whether an action or statement is a threat is a matter for you, the jury, to decide. For example, you have heard evidence about physical blockades at clinics. You must decide whether the act of blockading constituted a threat.

You need not find that the defendant or co-conspirator intended to carry out the threat or was even capable of carrying out the threat in order to find that the action or statement was, in fact, a threat.

JURY INSTRUCTION NO. 28

Claim I -- RICO Violation

Proximate Cause

Finally, you must consider whether there was some direct relation between the wrongful actions of the defendant or others associated with PLAN and the injury or harm to plaintiffs' business or property rights, which includes a woman's right to seek medical services from a clinic, the right of the doctors, nurses and other clinic staff to perform their jobs, and the right of the clinics to provide medical services.

An injury or harm is "proximately caused" when an act plays a substantial part in bringing about or actually causing the injury or harm. In determining whether actions of defendant or someone else associated with PLAN proximately caused the injury or harm to the plaintiffs, you may consider the various unlawful acts under RICO discussed above and any overt act taken in furtherance of PLAN's goals.

JURY INSTRUCTION NO. 30

Defendants' Liability for Acts of Others

Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

JURY INSTRUCTION NO. 34

First Amendment

The First Amendment to the Constitution permits persons to join with others to express a particular viewpoint. In public debate, speech, including conduct, is protected by the First Amendment. This may be so even if the speech is uninvited and unwelcomed by the person to whom it is directed or to others within earshot. The First Amendment even protects speech that is insulting or even outrageous.

You have heard evidence of speeches made by some of the defendants and have read some of their writings. Some of those speeches and writings contain strong and emotional language. Mere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing unless the words used may be said to incite imminent unlawful conduct that in fact followed within a reasonable period. Speeches and writings may be taken, however, as evidence that the defendants or the enterprise gave other specific instructions to carry out violent acts or threats.

Threats to patients, owners or operators of clinics, clinic staff (including doctors), and those assisting patients, owners/operators of clinics, or staff are not protected by the First Amendment. Physical attacks on patients, owners/operators of clinics, or clinic staff are not protected by the First Amendment. Destruction of property is not protected by the First Amendment.

The protection of the First Amendment does not extend to joining together to deprive others of their lawful rights.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

86 C 7888 N.O.W. et al v. Scheidler, et al

SPECIAL INTERROGATORIES AND VERDICT FORM

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with")

   Joseph Scheidler Yes ✓ No ___

   Andrew Scholberg Yes ✓ No ___

   Timothy Murphy Yes ✓ No ___

   Pro-Life Action League Yes ✓ No ___

   Operation Rescue Yes ✓ No ___

3. Did the following Defendants participate in the operation or management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

   Joseph Scheidler Yes ✓ No ___

   Andrew Scholberg Yes ✓ No ___

   Timothy Murphy Yes ✓ No ___

   Pro-Life Action League Yes ✓ No ___

   Operation Rescue Yes ✓ No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	

(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	
(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

Yes ✓ No ___

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely on blockades of clinic doors or sit-ins within clinics, without more?

Yes ___ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No ___

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ___

9. If any defendant or any person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ___

Delaware Women's Health Organization:

Yes ✓ No ___

Summit Women's Health Organization:

Yes ✓ No ___

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequate compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $54,471.28

Delaware Women's Health Organization $31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler Yes ___ No ___

Andrew Scholberg Yes ___ No ___

Timothy Murphy Yes ___ No ___

Pro-Life Action League Yes ___ No ___

Operation Rescue Yes ___ No ___

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $_____

Delaware Women's Health Organization $_____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

4-20-98
Date

/s/ Amandis Rott
Foreperson

/s/ Sheila L. Lark
Juror

/s/ Patricia L. Mitchell
Juror

/s/ Kats Nakashima
Juror

/s/ Patrick L. Ostrander
Juror

/s/ Julie Martin
Juror

_____
Juror

Juror	Juror
Juror	Juror
Juror	

SUPREME COURT OF THE UNITED STATES

April 22, 2002

Re: Joseph Scheidler, et al. v. National Organization for Women, Inc., et al.
No. 01-1118
Operation Rescue
v. National Organization for Women, Inc., et al.
No. 01-1119

The motion of People for the Ethical Treatment of Animals, Inc. for leave to file a brief as amicus curiae is granted. The motion of Seamless Garment Network, et al., for leave to file a brief as amici curiae is granted. The motion of Life Legal Defense Foundation for leave to file a brief as amicus curiae is granted. The petitions for writs of certiorari are granted limited to Questions 1 and 2 presented by the petition in No. 01-1118. The cases are consolidated and a total of one hour is allotted for oral argument.

(15) (12)

Nos. 01-1118, 01-1119

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

---

80 pgs

QUESTIONS PRESENTED

1. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" – and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)) – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

2. Whether injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

RULE 24.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW) is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed.

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 24.1(b) and 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Initial Phase Of This Litigation 2

B. The Proceeding In The Trial Court Following Remand 4

C. The Court Of Appeals' Decision 8

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. POLITICAL PROTESTERS WHO INTERFERE WITH ACCESS TO A FACILITY OR BUSINESS THAT PROVIDES SERVICES TO THE PUBLIC, OR WITH THE FACILITY'S FREEDOM TO PROVIDE SERVICES AND OTHERWISE CONDUCT ITS OPERATIONS, DO NOT THEREBY COMMIT EXTORTION UNDER THE HOBBS ACT 10

TABLE OF CONTENTS—Continued

Page(s)

A. The Lower Courts' Broad Definition Of Extortion Is Inconsistent With The Text And Structure Of Section 1951 And With This Court's Decisions 11

B. The Antecedents Of The Hobbs Act In New York Law Make Clear That Extortion Requires An Actual Transfer Of Property From The Victim (An "Obtaining") And Covers Only Limited Forms Of Property (And Certainly Not Every "Interest" Of "Value" To Persons) 18

1. The Field Penal Code Of 1865 19

2. The New York Penal Laws 21

3. The Pre-1946 Case Law Under The New York Statutes Cannot Be Squared With Respondents' Extortion Theories 24

C. The Legislative History Of The Hobbs Act Confirms Congress's Intent To Adhere To The Limitations Adopted Under New York Law And Not To Punish Coercion 28

D. The Seventh Circuit's Broad Definition Of Extortion Should Be Rejected For Other Reasons As Well 32

TABLE OF CONTENTS—Continued

Page

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF ... 36

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief 37

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief 44

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

A.L. Reed Co. v. *Whitman*,
238 N.Y. 535 (1924) 25

A.S. Beck Co. v. *Johnson*, 153 Misc. 363,
274 N.Y.S. 946 (Sup. Ct. 1934) 25

Agency Holding Corp. v. *Malley-Duff & Assocs.*,
483 U.S. 143 (1987) 37, 39, 44, 47

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 44

Alexander v. *United States*, 509 U.S. 544 (1993) 36

Associated Gen. Contractors of California v.
California State Council of Carpenters,
459 U.S. 519 (1983) 38, 39

Bell v. *United States*, 349 U.S. 81 (1955) 33

California v. *American Stores Co.*,
495 U.S. 271 (1990) 38, 50

Carpenter v. *United States*, 484 U.S. 19 (1987) 16

Chickasaw Nation v. *United States*,
122 S. Ct. 528 (2001) 48

Cleveland v. *United States*, 531 U.S. 12 (2000) .. 16, 17, 33

Commonwealth v. *Rourke*,
10 Cush. 397 (Mass. 1852) 20

Corbett v. *State*, 31 Ala. 329 (1858) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Evans v. *United States*, 504 U.S. 255 (1992) ..... *passim*

FTC v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411 (1990) 36

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 33

Graves v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) 50

Great-West Life & Annuity Ins. Co. v. *Knudson*, 122 S. Ct. 708 (2002) 44

Griffin v. *United States*, 502 U.S. 46 (1991) 17

H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 45

Holmes v. *SIPC*, 503 U.S. 258 (1992) 37, 38, 39, 45

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 48

In re Bronson, 150 N.Y. 1 (1896) 23

In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) 43

Johnson v. *People*, 4 Den. 364 (N.Y. Sup. Ct. 1847) 20

Kaushal v. *State Bank of India*, 556 F. Supp. 576 (N.D. Ill. 1983) 43

TABLE OF AUTHORITIES—Continued

Page(s)

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 39

Ladner v. *United States*, 168 F.2d 771 (5th Cir.), cert. denied, 335 U.S. 827 (1948) 31

Lancaster Community Hosp. v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991) 34

Linnenden's Case, 1 City. H. Rec. 30 (N.Y. 1842) 20

Low v. *People*, 2 Park. 37 (N.Y. Sup. Ct. 1848) 20

McCormick v. *United States*, 500 U.S. 257 (1991) 14, 18, 34

McNally v. *United States*, 483 U.S. 350 (1987) .. 16, 17, 35

Minnesota v. *Northern Securities Co.*, 194 U.S. 48 (1904) 38, 50

National R.R. Passenger Corp. v. *National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) 44

Nick v. *United States*, 122 F.2d 660 (8th Cir.), cert. denied, 314 U.S. 687 (1941) 31

Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) 38

Payne v. *People*, 6 Johns 103 (N.Y. Sup. Ct. 1810) 20

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Ashworth*, 222 N.Y.S. 24 (N.Y. App. Div. 1927) 23, 26

People v. *Barondess*, 31 N.E. 240 (N.Y. 1892) 22

People v. *Bradley*, 4 Park. 245 (N.Y. Super. Ct. 1858) 20

People v. *Cadman*, 57 Cal. 562 (1881) 27

People v. *Campbell*, 4 Park. 386 (N.Y. Ct. Gen. Sess. 1859) 20

People v. *Caryl*, 12 Wend. 547 (N.Y. Sup. 1834) 20

People v. *Garland*, 69 N.Y.2d 144 (1987) 26

People v. *Ginsberg*, 262 N.Y. 556 (1933) 27

People v. *Griffin*, 2 Barb. 427 (N.Y. Sup. Gen. Term 1848) 22

People v. *Kaplan*, 240 A.D. 72 (N.Y. App. Div. 1934) 28

People v. *Kenny*, 119 N.Y.S. 854 (N.Y. App. Div. 1909) 27

People v. *Learman*, 28 N.Y.S.2d 360 (N.Y. App. Div. 1941) 24, 25

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Loomis*, 4 Den. 380 (N.Y. Sup. Ct. 1847) 20

People v. *Robinson*, 20 P.2d 369 (Cal. App. 1933) 27

People v. *Scotti*, 266 N.Y. 480 (1934) 28

People v. *Spatarella*, 34 N.Y.2d 157 (1974) 26

People v. *Squillante*, 185 N.Y.S.2d 357 (N.Y. Spec. Term 1959) 23, 25, 27

People v. *Warden*, 145 A.D. 861 (N.Y. App. Div. 1911) 22, 23

People v. *Weil*, 273 N.Y. 653 (1937) 28

People v. *Weinseimer*, 117 A.D. 603 (N.Y. App. Div. 1907) 23

People v. *Weisbard*, 248 N.Y.S. 399 (City Mag. Ct. 1931) 25

People v. *Wilzig*, 4 N.Y. Crim. Rep. 403 (N.Y. County Ct. 1886) 23

People v. *Wisch*, 296 N.Y.S.2d 882 (N.Y. Sup. Ct. 1969) 26

Reg. v. *Jones*, 7 Cox. 498 (1858) 20

Reg. v. *Morrison*, 8 Cox. 194 (1859) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Reg. v. *Smith*, 7 Cox. 93 (1855) 20

Reg. v. *White*, 6 Cox. 213 (1853) 20

Religious Tech. Ctr. v. *Wollersheim*,
796 F.2d 1076 (1986), cert. denied,
479 U.S. 1103 (1987) 8, 47, 48

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 44, 45

Rewis v. *United States*, 401 U.S. 808 (1971) 33

Rex v. *Cheafor*, 2 Den. 361 (1851) 20

Rex v. *Headge*, 2 Leach 1033 (1809) 20

Rex v. *Martin*, 1 Leach 171 (1777) 19

Rex v. *Westbeer*, 1 Leach 12 (1739) 20

Roe v. *Wade*, 410 U.S. 113 (1973) 13

Rotella v. *Wood*, 528 U.S. 549 (2000) 39, 44, 45

Russello v. *United States*, 464 U.S. 16 (1983) 48

Sedima, S.P.R.L. v. *Imrex Co.*,
473 U.S. 479 (1985) 4, 43, 45

Sedima, S.P.R.L. v. *Imrex Co.*, 741 F.2d 482
(2d Cir. 1984), rev'd, 473 U.S. 479 (1985) 45, 46

Smith v. *United States*, 508 U.S. 223 (1993) 14

TABLE OF AUTHORITIES—Continued

Page(s)

State v. *Bond*, 8 Clarke 540 (Iowa 1859) 20

State v. *Coleman*, 110 N.W. 5 (Minn. 1906) 27

State v. *Hall*, 5 Harring 492
(Del. Ct. Gen. Sess. 1854) 20

State v. *Prince*, 284 P. 108 (Utah 1930) 27

State v. *Taylor*, 3 Dutch 117 (N.J. 1858) 20

Steel Co. v. *Citizens for a Better Environment*,
523 U.S. 83 (1998) 43

Tafflin v. *Levitt*, 493 U.S. 455 (1990) 43

Town of West Hartford v. *Operation Rescue*,
915 F.2d 92 (2d Cir. 1990) 34

Transamerica Mortgage Advisors, Inc. v. *Lewis*,
444 U.S. 11 (1979) 44

United States v. *Bass*, 404 U.S. 336 (1971) 33

United States v. *Bellomo*, 176 F.3d 580 (2d Cir.),
cert. denied, 528 U.S. 987 (1999) 33

United States v. *Carson*,
52 F.3d 1173 (2d Cir. 1995) 49

United States v. *Compagna*, 146 F.2d 524
(2d Cir.), cert. denied, 324 U.S. 867 (1945) 31

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Cooper Corp.*,
312 U.S. 600 (1941) 38

United States v. *Culbert*,
435 U.S. 371 (1978) 18, 28, 31, 32

United States v. *Enmons*,
410 U.S. 396 (1973) ..... *passim*

United States v. *Green*,
350 U.S. 415 (1956) 12, 30

United States v. *Henry*,
29 F.3d 112 (3d Cir. 1994) 34

United States v. *Hirsch*,136 F.2d 976 (2d Cir.),
cert. denied, 320 U.S. 759 (1943) 31

United States v. *Local 807*,
315 U.S. 521 (1942) 29, 30, 31

United States v. *McGlone*,
19 F. Supp. 285 (E.D. Pa. 1937) 31

United States v. *Nedley*,
255 F.2d 350 (3d Cir. 1958) 12

United States v. *Panaro*,
266 F.3d 939 (9th Cir. 2001) 12

United States v. *Philip Morris Inc.*,
116 F. Supp. 2d 131 (D.D.C. 2000) 49

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp.
1114 (E.D.N.Y. 1992) 35

United States v. *Tropiano*,
418 F.2d 1069 (2d Cir. 1969),
cert. denied, 379 U.S. 1021 (1970) 33

Vendo Co. v. *Lektro-Vend Corp.*,
433 U.S. 623 (1977) 38

Ward v. *People*, 6 Hill 144 (N.Y. 1843) 20

Wilbur v. *Blanchard*,
126 P. 1069 (Idaho 1912) 27

Statutes:

16 U.S.C. § 460jjj-2 12

18 U.S.C. § 242 12

18 U.S.C. § 1341 ..... 16, 17

18 U.S.C. § 1346 12

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1951(a) 10, 15

18 U.S.C. § 1951(b) 14

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 1951(b)(1) 11

18 U.S.C. § 1951(b)(2) ..... *passim*

18 U.S.C. § 1952(b) 7

18 U.S.C. § 1961(1)(a) 7

18 U.S.C. § 1962(c) 3

18 U.S.C. § 1962(d) 3

18 U.S.C. § 1963(a) 36

18 U.S.C. § 1964 36

18 U.S.C. § 1964(a) ..... *passim*

18 U.S.C. § 1964(b) ..... *passim*

18 U.S.C. § 1964(c) ..... *passim*

18 U.S.C. § 2333(a) 13

20 U.S.C. § 4302 13

28 U.S.C. § 1254(1) 1

Act of July 3, 1946, ch. 537, 60 Stat. 420 18

Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914)
(current version at 15 U.S.C. § 15(a)) 37, 40

TABLE OF AUTHORITIES—Continued

Page(s)

Clayton Act, ch. 323, § 15, 38 Stat. 730 (1914)
(current version at 15 U.S.C. § 25) 41, 43

Clayton Act, ch. 323, § 16, 38 Stat. 737 (1914)
(current version at 15 U.S.C. § 26) 38, 41, 50

Federal Anti-Racketeering Act of 1934,
48 Stat. 979, ch. 569 (1934) 18, 29

Freedom of Access to Clinic Entrances Act,
18 U.S.C. § 248 36

Law of July 2, 1890, ch. 647, § 4,
26 Stat. 209 (current version at
15 U.S.C. § 4) 40, 41, 43

Law of July 2, 1890, ch. 647, § 7,
26 Stat. 209 (repealed 1955) 37

Racketeer Influenced and Corrupt Organizations
Act, Title IX of the Organized Crime Control
Act of 1970, Pub. L. No. 91-452, 84 Stat. 941
(1970) 3, 36

N.Y. PENAL LAW § 530 (1909) 24

N.Y. PENAL LAW § 552 (1881) 21

N.Y. PENAL LAW § 850 (1909) 21, 22, 23

N.Y. PENAL LAW § 851 (1909) 21, 22, 23

N.Y. PENAL LAW § 852 (1909) 21, 22

TABLE OF AUTHORITIES—Continued

Page(s)

N.Y. PENAL LAW § 853 (1909) 21, 22

N.Y. PENAL LAW § 854 (1909) 24, 25

N.Y. PENAL LAW § 1290(1) (1909) 23

N.Y. PENAL LAW § 2120 (1909) 22, 23

Miscellaneous:

78 CONG. REC. 5734-35 (1934) 29

78 CONG. REC. 5859 (1934) 30

78 CONG. REC. 11,482 (1934) 30

89 CONG. REC. 3194 (1943) 32

91 CONG. REC. 11,900 (1945) 32

91 CONG. REC. 11,907 (1945) 32

91 CONG. REC. 11,908 (1945) 32

91 CONG. REC. 11,912 (1945) 31

115 CONG. REC. 6995-96 (1969) 45

116 CONG. REC. 35,227-28 (1970) 46, 47

116 CONG. REC. 35,346 (1970) 46, 47

TABLE OF AUTHORITIES—Continued

Page(s)

116 CONG. REC. 35,347 (1970) 47

118 CONG. REC. 29,368 (1972) 47

118 CONG. REC. 29,369-70 (1972) 47

118 CONG. REC. 29,379 (1972) 48

BLACK'S LAW DICTIONARY (5th ed. 1979) 11

W. BLACKSTONE, COMMENTARIES (17th ed. 1830) .. 20, 21

Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009 (1980) 45, 48

Blakey & Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345 (1996) 24

Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984) 29

W. BURDICK, THE LAW OF CRIME (1946) 20

THE COLLEGE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1943) 11

Commissioners of the Code, *Proposed Model Penal Code of the State of New York* (1865) 19

TABLE OF AUTHORITIES—Continued

Page(s)

CORPORATE COUNSEL'S GUIDE TO EMPLOYMENT CONTRACTS (1999) 25

H.R. Rep. No. 238, 79th Cong., 1st Sess. (1945) 31

H.R. Rep. No. 1833, 73d Cong., 2d Sess. (1934) 29

H.R. 19215, 91st Cong., 2d Sess. (1970) 45

H.R. 19586, 91st Cong., 2d Sess. (1970) 45

Hearings on H.R. 5218, H.R. 6752, H.R. 6872, and H.R. 7067 Before the Subcommittee No. 3 of the House Committee on the Judiciary, 77th Cong., 2d Sess (1942) 31

Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988) 19, 27

W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984) 25

W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW (1986) 21, 22

Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) 35

Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 41, 46

TABLE OF AUTHORITIES—Continued

Page(s)

Reich, *The New Property*, 73 YALE L.J. 733 (1964) 33

2 RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (1977) 14

S. 1623, 91st Cong., 1st Sess (1969) 45

S. 2049, 90th Cong., 1st Sess. (1967) 45

S. 2248, 73d Cong., 2d Sess. (1934) 30

S. Rep. No. 1189, 75th Cong., 1st Sess. 3 (1937) 29

S. Rep. No. 1440, 73d Cong., 2d Sess. 1 (1934) 29

U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS (2000) 36, 49, 50

WEBSTER'S TWENTIETH CENTURY DICTIONARY UNABRIDGED (1942) 11

OPINIONS BELOW

The opinion of the court of appeals (01-1118 Pet. App. 1a-31a) is reported at 267 F.3d 687. The order denying rehearing (01-1118 Pet. App. 142a-143a) is unreported. The district court's opinion disposing of the motion to dismiss the third amended complaint (*id.* at 32a-108a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (01-1118 Pet. App. 109a-141a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on October 2, 2001, and rehearing was denied on October 29 (01-1118 Pet. App. 1a, 142a). The petitions for certiorari were timely filed on January 28, 2002, and granted on April 22, limited to Questions 1 and 2 presented by the petition in No. 01-1118. J.A. 149. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, and various federal and New York statutes on which the Hobbs Act and RICO were modeled, are set forth in an appendix to this brief (App., *infra*, 1a-7a).

STATEMENT

For the past sixteen years, respondents have pursued this unprecedented federal racketeering lawsuit against several individuals and organizations (petitioners here) that have regularly engaged in or supported sit-ins and other political protests against abortion clinics. Following a seven-week trial, respondents persuaded a jury that petitioners had committed multiple acts of "extortion" – a serious federal felony punishable by up to 20 years in prison for each violation – by participating in or supporting protest actions that obstructed access to clinics or impeded the ability of patients to seek services, and doctors and staff to work, at the clinics. On the basis of that verdict, two of the respondent clinics obtained an award of treble damages and

all respondents secured a broad nationwide injunction restricting petitioners' protest activities for twelve years.

In affirming, the Seventh Circuit approved two substantial and unwarranted expansions of the federal racketeering laws. First, it held that the crime of extortion under the Hobbs Act – which requires "the *obtaining* of *property* from another" through certain wrongful means (18 U.S.C. § 1951(b)(2) (emphasis added)) – occurs when there is an "interference with" such "intangible" liberty or property interests as the right of putative patients "to seek medical services," or the clinics' "right to conduct a business," or the right of clinic employees "to perform [a] job[]." 01-1118 Pet. App. 28a-29a. Second, the Seventh Circuit became the first appellate court in the more than thirty years since RICO was enacted to hold that a private plaintiff may go beyond the remedies Congress has specified in 18 U.S.C. § 1964(c) – "threefold * * * damages," the "cost of the suit," and "a reasonable attorney's fee" – and secure injunctive relief. Both holdings should be reversed.

A. The Initial Phase Of This Litigation

Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL) is a nonprofit Illinois corporation. Operation Rescue, the petitioner in No. 01-1119, is an unincorporated organization. Respondents the National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are, respectively, a national nonprofit organization that supports the legal availability of abortion and two clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against the petitioners in these consolidated cases (and various others who ceased to be defendants before trial). In their amended complaint, respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which

abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by any unlawful activities of petitioners. NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged violations of the Sherman Act (15 U.S.C. § 1), RICO (18 U.S.C. §§ 1961-1968), and state law.

In their RICO claims, respondents alleged that petitioners had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise." Respondents claimed that petitioners, by engaging in protests aimed at disrupting and closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" in violation of 18 U.S.C. § 1962(c). The pattern of racketeering activity allegedly included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Specifically, respondents accused petitioners of having engaged in extortion by "wrongful[ly] us[ing] * * * actual or threatened force, violence, or fear," *id.* § 1951(b)(2), to "obtain[]" respondents' "property," by inducing doctors and clinic employees to leave their jobs and by discouraging and obstructing putative patients from obtaining abortions. Respondents also alleged a conspiracy in violation of 18 U.S.C. § 1962(d).

The district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937 (1991), and the Seventh Circuit affirmed, 968 F.2d 612 (1992), holding in relevant part that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court reversed, holding that RICO contains no economic motive requirement. 510 U.S. 249, 256 (1994).

B. The Proceeding In The Trial Court Following Remand

Respondents filed a third amended complaint. See J.A. 33-55 (excerpts of complaint). For the first time, respondents requested injunctive relief under RICO. J.A. 40, 55.[1]

1. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims under Section 1962(c) and Section 1962(d) against petitioners. 01-1118 Pet. App. 32a-108a. The court rejected petitioners' contention that they had not "obtained" any "property" of respondents within the meaning of the Hobbs Act. *Id.* at 69a-73a. "The definition of 'property' under the Hobbs Act is expansive," the court said, encompassing "intangible as well as tangible property," including "the right to conduct business." *Id.* at 70a. Moreover, the district court said, under Seventh Circuit law property is "obtained" whenever a victim sustains some loss. *Id.* at 70a-71a. The court agreed with petitioners that "this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience," but suggested that this "argument works in [respondents'] favor" because "many who fought segregation using civil disobedience * * * *were* arrested, jailed, and otherwise punished." *Id.* at 73a (emphasis in original).

The district court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. §1964(c). 01-1118 Pet. App. 87a-90a. The court said that it was "reluctant" to read RICO "in a limited way" given this Court's "instruction that 'RICO is to be read broadly' and * * * the very purpose of the statute is to 'supplement and strengthen the means already available for fighting crime.'" *Id.* at 90a (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 498 (1985)).[2]

---

[1] In their RICO Case Statement, respondents were required to list any state or federal criminal extortion convictions based on any of the scores of allegedly "extortionate" sit-ins and demonstrations that formed the basis for respondents' Hobbs Act and RICO claims. See RICO Case Statement [Amended], at 5-6, Exhs. A, B (Oct. 31, 1994). None was listed.

[2] Several years later the district court formally certified the two classes described above. 172 F.R.D. 351, 363 (1997). The class of putative clinic patients who were not members of NOW sought only injunctive relief and thus was certified only under Rule 23(b)(2); the clinic class, which also sought treble damages, was certified under Rules 23(b)(2) and (b)(3). See 172 F.R.D. at 362-63 & n.8; J.A. 39, 58. Thereafter certain defendants – including Operation Rescue but not the other petitioners – moved for summary judgment. The court granted the motion in part (01-1119 Pet. App. 157a-231a), observing that this lawsuit was "paradigmatic of RICO's seemingly unlimited applicability." *Id.* at 158a. Among other things, the court held that respondents had failed to raise any triable issue of fact on certain of their more inflammatory claims, including alleged predicate acts of murder, kidnaping, and arson. *Id.* at 199a-202a. The court also reiterated its conclusions with respect to the scope of extortion under the Hobbs Act. *Id.* at 194a-199a.

2. The case was tried from March 2 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of abortion protesters over a 15-year period. 01-1118 Pet. App. 4a ("hundreds of acts").[3] Over petitioners' objections, the jury was instructed:

> In order to show that extortion has been committed in violation of federal law, the plaintiffs must show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinics themselves to give up a property right.
>
> The term property right means anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

---

[3] Consistent with its summary judgment ruling (01-1119 Pet. App. 199a-201a), the court instructed the jury that there was "no claim in this case" that the "defendants themselves are responsible for" any "incident[] of murder, arson, and bombing." 01-1118 Pet. App. 146a (Tr. 4939).

> Fear includes not only fear of physical violence but fear of wrongful economic injury.

Id. at 150a-151a (quoting Tr. 4944-4946); see also J.A.136.[4]

Not surprisingly, respondents had already taken full advantage during the trial proceedings of this sweeping definition of extortion. Time and again, they urged the jury to find acts of extortion based on sit-ins at clinics that interfered in any way with the freedom of patients to receive services.[5] Even a temporary interference with a clinic's operations or the freedom of patients to receive services, respondents told the jury, amounted to an extortion. See Tr. 5005 ("[E]xtortion occurs when a legally protected right is interfered with even for a short period of time * * *."), 5008 ("Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion."), 5037 ("Every moment that [a clinic] was closed * * * was an act of extortion.").

The jury was provided with special interrogatories and a verdict form requiring it to answer whether "any Defendant, or any other person associated with PLAN, commit[ted] any of the following acts" and to check "Yes" or "No" for each type of predicate offense alleged. J.A. 143-44. The jury was required to indicate the "number of acts" in each category. *Ibid.*[6]

---

[4] During the colloquy on the jury instruction, counsel for respondent NOW noted that Operation Rescue's counsel had "asked every witness whether any tangible property was obtained," and then admitted: "everybody knows *there's no allegation* about that" in this case. Tr. 4327; accord J.A. 51-55 (third amended complaint) (failing to allege that petitioners had obtained any tangible property of respondents), 64, 68-77 (pretrial order) (respondents failed to list this as a contested issue of fact in the case).

[5] Tr. 550 ("[W]hatever service she was coming for if these defendants interfered with her right, * * * that is a violation of RICO."), 567 ("Forcible blockades are * * * an extortion of a woman's constitutional right to abortion and of the clinics' right to perform abortion services."), 4987, 4990-4991, 5003-5004, 5005, 5008.

[6] The special interrogatories form asked whether, if the jury found an act of extortion in violation of the Hobbs Act, its finding was "based solely on blockades of clinic doors or sit-ins within clinics, without more." J.A. 145. During closing argument, however, respondents' counsel told the jury that this "safe harbor" for peaceful protests and sit-ins "without more" did not apply unless a blockade "didn't keep anybody out" of a clinic. Tr. 4987.

The jury returned a verdict for respondents on their claim under Section 1962(c) and, consistent with the instructions, did not reach the RICO conspiracy claim. Based on the instructions, the jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951.[7] Because the judge had rejected petitioners' request that the jury be required to specify the conduct giving rise to any predicate acts it found (Tr. 4495-98), the verdict form did not identify the basis for liability.

Based on evidence of certain increased security costs two clinics had incurred as a result of the protests (but not diminution of profits), the jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit (but no damages to any of the other members of the clinic class).[8] Pursuant to RICO, these damages were trebled. Thereafter, on July 28, 1999, the district court entered a broad nationwide injunction regulating petitioners' future protest activities at clinics. 01-1118 Pet. App. 109a-141a. The court "retain[ed] jurisdiction to enforce the terms of this injunction for twelve (12) years." *Id.* at 141a.

---

[7] The jury also found 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion), which qualify as predicate acts under RICO, see 18 U.S.C. § 1961(1)(A); 25 attempts or conspiracies to violate federal or state extortion law; 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951; 23 violations of the Travel Act, which proscribes travel across state lines or use of the mails or telephone, with the intent to commit extortion under the Hobbs Act or state law, see 18 U.S.C. §§ 1952(b), 1961(1)(A); and 23 attempts to violate the Travel Act. The relevant jury instructions and the special verdict form are reprinted at 01-1118 Pet. App. 146a-157a; J.A. 142-48.

[8] At least one member of the nationwide clinic class is a non-profit corporation. See Tr. 1427-28; cf. also J.A. 35-36 (stating that "[c]linics such as DWHO and Summit" provide "low-cost abortion services").

C. The Court Of Appeals' Decision

A panel of the Seventh Circuit affirmed. 01-1118 Pet. App. 1a-31a. Two aspects of the court of appeals' decision are pertinent here. *First*, the panel rejected petitioners' argument that "the things * * * [allegedly] taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered 'property' for purposes of the Hobbs Act." *Id.* at 28a-29a. The Seventh Circuit "ha[d] repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and indicated that it would "not revisit that holding here." *Id.* at 29a.

The panel also rejected petitioners' argument that, "even if 'property' was involved, [petitioners] did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Ibid.* That argument was "contrary to * * * precedent in this circuit holding that as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, *or interference with the rights of*, the victim is all that is required." *Ibid.* (emphasis added; citation and internal quotation marks omitted).

The panel also held that injunctive relief is available to a private litigant under RICO, 18 U.S.C. § 1964(c). *Id.* at 6a-14a. In so holding, the court disagreed with the Ninth Circuit's decision in *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987), and became the first appellate court to approve injunctive relief in this setting in the more than 30 years since RICO's enactment.

SUMMARY OF ARGUMENT

Both of the questions raised in this case call on the Court to interpret statutory provisions that Congress consciously modeled on prior provisions of law whose meaning was well established. In passing the Hobbs Act in 1946, 18 U.S.C. § 1951, Congress incorporated almost verbatim the definition of extortion contained in the Field Code of 1865, an early model penal

code proposed in New York, and in the New York Penal Codes of 1881 and 1909 (which in turn were based on the Field Code). Similarly, when Congress passed RICO in 1970, it included a provision authorizing private civil actions for treble damages that was modeled after virtually identical provisions in the Sherman Act of 1890 and the Clayton Act of 1914. The Court accordingly must examine these predecessor provisions.

I. The lower courts' definition of extortion is refuted by the text, structure, and legislative history of the Hobbs Act and its predecessor statute, the Federal Anti-Racketeering Act of 1934. Not only did the lower courts read the word "obtaining" out of the statute, but they also applied a concept of "property" that is so expansive that it appears to sweep in most if not all property-based rights and interests and many other liberty-based interests as well. In effect, it transforms the crime of extortion into the much broader, and less serious, crime of coercion – even though Congress elected, in passing the Hobbs Act, to punish robbery and extortion and *not* to punish coercion.

The Seventh Circuit's analysis also represents a substantial departure from the settled meaning of "extortion" – and "obtaining of property from another" – which are terms of art. The meanings of those terms of art in the Field Code of 1865, and in later New York statutes on the books in 1946, bear almost no resemblance to the broad definition of extortion endorsed by the lower courts in this case. Even if the Court were to depart from the traditional meaning of extortion, it should reject the Seventh Circuit's approach as flawed in multiple respects.

II. As this Court has repeatedly recognized, civil RICO was directly modeled on the federal antitrust laws. Specifically, Section 1964(c), which authorizes private civil lawsuits, is taken almost verbatim from a provision in the Clayton Act of 1914 (which in turn was modeled on a virtually identical provision in the Sherman Act of 1890). At the time RICO was enacted, this Court had interpreted the precursor Sherman Act provision *as not allowing private parties to seek injunctive relief*. Moreover, the text, structure, and legislative history of RICO all confirm that Congress intended to limit the relief available to private

parties to the civil remedies specified in the statute: treble damages, costs and attorney's fees. Allowing private injunctive relief would lead to a significant expansion of the scope of civil RICO by arming private litigants with a wide array of intrusive equitable remedies such as the appointment of monitors and trustees and even corporate dissolution.

ARGUMENT

I. POLITICAL PROTESTERS WHO INTERFERE WITH ACCESS TO A FACILITY OR BUSINESS THAT PROVIDES SERVICES TO THE PUBLIC, OR WITH THE FACILITY'S FREEDOM TO PROVIDE SERVICES AND OTHERWISE CONDUCT ITS OPERATIONS, DO NOT THEREBY COMMIT EXTORTION UNDER THE HOBBS ACT

The Hobbs Act makes it a felony punishable by imprisonment for up to 20 years to interfere with interstate commerce by acts of extortion. 18 U.S.C. § 1951(a). The Hobbs Act defines "extortion" to "mean[] the *obtaining* of *property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). The jury in this case found that petitioners had committed 21 separate acts of extortion in violation of the Hobbs Act.

The jury based that determination, however, on a sweeping – and legally untenable – definition of "extortion." Over petitioners' repeated objections (*e.g.*, Tr. 4324-26, 4882), the trial court instructed the jury that it could find that petitioners committed extortion if it found that they – "or someone else associated with PLAN" – "knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear" (including "fear of wrongful economic injury") to "cause women, clinic doctors, nurses, or other staff or the clinics themselves to *give up*" any "*property right*." 01-1118 Pet. App. 150a (quoting Tr. 4945) (emphasis added). A "property right" was in turn broadly defined as "*anything* of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other

clinic staff to perform their jobs, and the right of the clinics to provide medical services." *Ibid.* (emphasis added). "It does not matter," the jury was instructed, "whether or not the extortion provided an economic benefit to PLAN." *Ibid.* At every turn, respondents exploited this broad definition of extortion in urging the jury to find liability. See page 6, *supra*.

As we explain below, the jury instructions in this case – and the Seventh Circuit's analysis upholding them – represent a vast and unwarranted expansion of the traditional felony of "extortion" under the Hobbs Act.

A. The Lower Courts' Broad Definition Of Extortion Is Inconsistent With The Text And Structure Of Section 1951 And With This Court's Decisions

1. The Hobbs Act defines extortion as "the *obtaining* of *property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added).[9] The Seventh Circuit's definition of "extortion" is flatly inconsistent with that definition, first and foremost, because it reads the requirement of "obtaining" completely out of the statute. As a matter of common usage, to "obtain" something means to "acquire," "procure," "get hold of," or "get possession of" it. BLACK'S LAW DICTIONARY 972 (5th ed. 1979); WEBSTER'S TWENTIETH CENTURY DICTIONARY UNABRIDGED 1155 (1942); THE COLLEGE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 786 (1943). The same idea is reflected in definitions of the verb "to extort." See BLACK'S LAW DICTIONARY, at 525 ("To gain by wrongful methods; to obtain in an unlawful manner, as to compel payments by means of threats of injury to

---

[9] "Robbery" is separately defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(b)(1).

person, property, or reputation. To exact something wrongfully by threats or putting in fear.").

Contrary to the Seventh Circuit's view, to destroy or diminish the value of someone else's property is not the same as "obtaining" it. Neither is "obtaining" synonymous with "causing a deprivation." Congress knows how to reach "deprivations" of property or rights and has not done so in the Hobbs Act. Compare, *e.g.*, 16 U.S.C. § 460jjj-2 (any party "deprived of any property right" by change in law may seek compensation); 18 U.S.C. § 1346 (defining scheme or artifice to "deprive another of the intangible right of honest services" as a scheme or artifice to defraud); 18 U.S.C. § 242 (punishing willful "deprivation" of "rights" or "privileges" protected by Constitution or federal laws). As the Ninth Circuit has correctly explained:

> [U]nder the Hobbs Act, extortion, which is *a larceny-type offense*, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone — either the extortioner or a third person — must receive the property of which the victim is deprived.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (emphasis added) (upholding extortion convictions of defendants who "sought not only to put [the owner of an auto shop] out of business, but actually to *get his business for themselves*"). See also *United States* v. *Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958) (use of physical force and violence to interfere with an owner's dominion and control over his truck and delay its movement was not "obtaining").[10]

---

[10] *United States* v. *Green*, 350 U.S. 415 (1956), is not to the contrary. In holding that unions and their officials could violate the Hobbs Act by attempting to obtain benefits for union members, the Court stated that "extortion as defined in the statute in no way depends upon having *a direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis added). The Court did *not* say that property need not be obtained; it simply stated that the property could be obtained for the benefit of someone other than the defendant. *Ibid.*; accord *Panaro*, 266 F.3d at 947-48.

But the Seventh Circuit's linguistic errors do not end there. The court of appeals also concluded that a person's "right[] to seek medical services from the clinics" is "property" capable of being extorted in violation of the Hobbs Act. Although "property" – when viewed without regard to context – can be defined in a wide variety of ways, even the broadest definition does not encompass "a woman's right to seek services from a clinic." 01-1118 Pet. App. 150a (quoting Tr. 4945). No ordinary speaker of the English language would describe a prospective patient's interest in obtaining services – or right to have an abortion – as "property." Not surprisingly, *Roe* v. *Wade* classifies the types of rights a woman is exercising when visiting a clinic – the right to decide whether to terminate a pregnancy and the right to make decisions about procreation – as *liberty*, not property, interests. 410 U.S. 113, 152-53 (1973). If the law were otherwise, all manner of conduct proscribed by state law – commission of a tort, breach of contract, disturbance of the peace, even loitering – could be transformed into Hobbs Act extortion if such conduct adversely affected someone's liberty interests. That cannot be.

Nor is there a basis in the statute for the court of appeals' assumption – and the jury instructions – that "property" is synonymous with any "property *right*." 01-1118 Pet. App. 150a (quoting Tr. 4945) (emphasis added). As we explain below, the language of the Hobbs Act makes clear that not every "interest" or "right" in property can be the subject of extortion. Nor did Congress say "property interest" or "property right" when it drafted the Hobbs Act; it said "property." See 20 U.S.C. § 4302 (vesting university with "property and the rights of property * * * including the right to sue and be sued and to own, acquire, sell, mortgage or otherwise dispose of property"). In RICO, Congress has recognized that not every injury to a business is an injury to "property." See 18 U.S.C. § 1964(c) (standing to assert RICO claim requires injury to "business *or* property") (emphasis added); see also 18 U.S.C. § 2333(a) (terrorism law) (standing requires injury to "person, property, or business").

2. This conclusion – that "obtaining" is not synonymous with "interfering with," and that "property" does not encompass every "interest" that may be of "value" to human beings – gathers additional force from the "surround[ing]" language in the statute. *Smith* v. *United States*, 508 U.S. 223, 229 (1993). The Hobbs Act covers the "obtaining of property *from another*" (18 U.S.C. § 1951(b)(2) (emphasis added)), which confirms that "obtaining" connotes the *acquisition or transfer* of some item of "property" *from* the owner *to* someone else. That language also suggests that only property actually capable of being transferred or assigned is "property" under the Hobbs Act. Certain forms of property – and certain nontransferable interests or rights in property – can be damaged, impaired, or destroyed but not "obtained." *E.g.*, 2 RESTATEMENT (SECOND) OF THE LAW OF PROPERTY § 15.1 & cmt. B (1977) (tenancy at will "inherently exists only as long as both [landlord and tenant] will its continuance" and thus cannot be transferred or assigned). Thus, the language of Section 1951 makes clear that not every right or interest in property can be the subject of extortion.

Another important structural clue to the meaning of "obtaining of property from another" (18 U.S.C. § 1951(b)) lies in the fact that the phrase applies with equal force to extortion "under color of official right." The Hobbs Act criminalizes both private and official extortion. Official extortion occurs when a public official engages in "the obtaining of property from another, with his consent, * * * under color of official right." *Id.* § 1951(b)(2). Private extortion occurs when the extortionist engages in "the obtaining of property from another, with his consent, * * * induced by wrongful use of actual or threatened force, violence, or fear." *Ibid.* Whatever it means to "obtain[] * * * property from another," that concept must have the same meaning under the official and private extortion prongs of the Hobbs Act. And it is highly implausible that Congress intended to expand the scope of official extortion vastly beyond its traditional limitations, see *Evans* v. *United States*, 504 U.S. 255 (1992); *McCormick* v. *United States*, 500 U.S. 257 (1991), to situations where public officials do not "obtain" any money or

other item of value but instead merely interfere with the liberty interests or intangible property interests of individuals.

Finally, other aspects of the Hobbs Act confirm that the "obtaining of property from another" cannot possibly have the expansive meaning it was given below – *i.e.*, any "loss" of, or "interference with," any interest or right of "value" to the victim. The Hobbs Act makes it a crime punishable by up to 20 years' imprisonment to "in *any way or degree*" interfere with interstate commerce through "extortion." 18 U.S.C. § 1951(a) (emphasis added). The crime encompasses not only acts of extortion but also *attempts* and *conspiracies* to commit extortion. And under the prevailing interpretation in the lower courts, the means by which "property" must be "obtained" – wrongful use of "force, violence or fear" – includes fear of economic injury or reputational harm in an extremely broad sense. Given these other expansive features of the Hobbs Act, it is difficult to imagine that all that is required to satisfy the element of "obtaining of property from another" is for the perpetrator to cause some "loss" to or "interference with" some interest or right of the victim. If that were true, the scope of felony extortion under the Hobbs Act would be vast indeed.

3. The Seventh Circuit's analysis is also inconsistent with several of this Court's decisions. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of physical violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had not obtained property by the "wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)), because they had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

In describing the "property" sought to be "obtained" from the employer, the Court in *Enmons* focused solely on the higher *wages* the union sought to win for its members; there was no

hint that the destruction of the employer's transformer, or the serious interference with its business operations during the strike, in any way amounted to "obtaining" (as opposed to *destroying* or *interfering with*) "property." The Court reasoned that "the obtaining of property" is "wrongful" within the meaning of the Hobbs Act only if "the alleged extortionist *has no lawful claim to th[e] property*." 410 U.S. at 400 (emphasis added). Because the defendants *did* have a lawful claim to higher wages, their activities were not "wrongful." But plainly the same could not be said for the destruction of the employer's transformer, the damage to its facilities, or the interference with its business operations. The defendants had no lawful claim to *that* "property." Accordingly, if "the obtaining of property from another" means what the Seventh Circuit says it means, the convictions would have been upheld in *Enmons*, and the Hobbs Act would regulate a wide array of strike activity.[11]

The lower courts' definition of "property" is also impossible to reconcile with *McNally* v. *United States*, 483 U.S. 350, 356 (1987), which held that "the intangible right of the citizenry to good government" is not "property" within the meaning of the mail fraud statute, 18 U.S.C. § 1341. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous," this Court explained, "we read § 1341 as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. The "right" to seek clinic services is not analytically different from the "right" to good government – both are civil liberties, not property. See also *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) (rejecting argument that State's "intangible rights of allocation, exclusion, and control" over issuance of video poker licenses constitutes "property" under the mail fraud statute); *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (making

[11] In the lower courts, petitioners argued that their conduct fell outside the scope of the Hobbs Act under *Enmons* because their objective was to stop abortion, which was legitimate even if the means used sometimes were unlawful. The Seventh Circuit ignored this argument. For the reasons set forth in Operation Rescue's brief (at 44-46), the Hobbs Act counts should have been dismissed on this ground alone.

clear the employer's "contractual right" to an employee's "honest and faithful service" is "an interest too ethereal to fall within the protection of the mail fraud statute"). Indeed, given the broader language of the mail fraud statute, which extends to "any scheme or artifice to defraud, or for obtaining money or property," 18 U.S.C. § 1341, the holdings of *McNally* and *Cleveland* should apply *a fortiori* here.

* * * * *

This Court need not look beyond the plain language and structure of Section 1951, and this Court's precedents, to see why the lower courts erred in defining the crime of extortion under the Hobbs Act. Whatever else the statute might cover, it does not punish the mere "interference with" the freedom of putative patients to receive clinic services. Since the sole basis for the extortion claims (and RICO standing) of respondent NOW and the class of patients it represents rested on that defective legal theory, the judgment in their favor cannot stand.[12] As for the respondent *clinics*, their claims of extortion appear to rest on different theories of "property": (1) "the right of the doctors, nurses, or other clinic staff" – who, notably, were not plaintiffs in this case – "to perform their jobs"; and (2) the "right of the clinics to provide medical services." 01-1118 Pet. App. 150a (quoting Tr. 4945). But just as with the extortion claims of the patients, the jury was not required to find that petitioners had actually "obtained" either of these interests. All that was required was a showing that the rights of the clinics and their employees had been interfered with. Because the jury

[12] In addition to 21 Hobbs Act extortion violations, the jury found that petitioners had committed a variety of other predicate acts (all of which petitioners challenged in the court of appeals). See note 7, *supra*. But as we explained in our reply brief at the petition stage (at 7-8), the verdict does not permit a determination of which predicate acts the jury relied on in finding either two acts within the requisite ten-year period or a racketeering "pattern." 01-1118 Pet. App. 160a. There is also no way of knowing which predicate acts the jury relied on in awarding damages. For those reasons, the judgment must be vacated if the instructions on the Hobbs Act extortion counts were erroneous. *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991).

instructions failed to require any "obtaining" by petitioners, the judgment of liability in favor of the clinics also cannot stand.

Given the history of this litigation, however, it is a safe bet that respondents will seek a retrial on any legal theory that survives this Court's decision. But see Br. for Pet. Operation Rescue ("OR Br."), at 49-50 (explaining why respondents are not entitled to a new trial). Because *all* of the respondents' theories of extortion suffer from additional, serious legal defects – and because the question presented is sufficiently broad to permit this Court to say so – the Court should resolve not only whether the jury instructions sustained by the Seventh Circuit were wrong in the ways just described, but also whether *any* of respondents' alternative theories can be squared with the meaning of "extortion" under the Hobbs Act. As we next demonstrate, they cannot.

B. The Antecedents Of The Hobbs Act In New York Law Make Clear That Extortion Requires An Actual Transfer Of Property From The Victim (An "Obtaining") And Covers Only Limited Forms Of Property (And Certainly Not Every "Interest" Of "Value" To Persons)

The Hobbs Act was passed in 1946 as an amendment to the Federal Anti-Racketeering Act of 1934. See Act of July 3, 1946, ch. 537, 60 Stat. 420; Act of June 18, 1934, ch. 569, 48 Stat. 979. As this Court has repeatedly explained, when Congress passed the Hobbs Act it drew the definition of "extortion" from the Field Penal Code of 1865, an early and influential model penal code for New York, as well as from New York Penal Codes of 1881 and 1909 that were based upon the Field Penal Code. See *Evans* v. *United States*, 504 U.S. 255, 261-62 nn.8-9 (1992) ("[o]ne of the models for the statute was the New York [extortion] statute" and "[t]he other model was the Field Code"); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) (discussing "[j]udicial construction of the New York statute" prior to 1946); *McCormick* v. *United States*, 500 U.S. 257, 279 (1991) (Scalia, J., concurring) (same); see also *United States* v. *Culbert*, 435 U.S. 371, 378-80 (1978). Those New York antecedents of the Hobbs Act confirm that "obtaining" must be given its conventional meaning (a genuine *acquisition*), and "property" must be read narrowly to encompass only money and other limited forms of valuable property (and by no means every "right" or "interest" of "value" to human beings).

1. The Field Penal Code Of 1865

In one of the earliest U.S. efforts to codify criminal law, David Field and others prepared a model penal code for New York based on English and American precedents. Commissioners of the Code, *Proposed Model Penal Code of the State of New York* § 613 (1865) ("Field Code"); see Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 534-37 (1988). In language almost identical to that eventually used in the Hobbs Act, the Field Code provided (at § 613):

> Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

A cross-reference immediately after this provision referred the reader to the "note to Section 584." Field Code § 613, note, at 220. Section 584 defined larceny and provided, in its own note, that "[f]our of the crimes affecting property, require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. * * * All four include the criminal *acquisition* of *property*." *Id.* § 584 note, at 210 (emphasis added). "In extortion," the commentary explained, "there is again a *taking*." *Ibid.* (emphasis added).

Moreover, the notes to Section 584 provide guidance concerning the meaning of "property" that may be "the subject of larceny." Field Code § 584 note, at 211. Specifically, the commentary cites 22 English, New York, and other American cases reflecting the contemporaneous, quite narrow understanding of "property" in this setting. The cited cases holding that certain items were "property" all involve money, tangible things of value, or notes, bills, or other written documents entitling the holder to money or other tangible property.[13] Moreover, six of

---

[13] See *Rex* v. *Martin*, 1 Leach 171 (1777) (wool pulled from the bodies of live

the cited cases (including four decided by New York courts) held that certain items were *not* "property" subject to the crime of larceny.[14] Those cases further confirm the exceedingly narrow understanding of "property" the drafters of the Field Code had in mind. See generally W. BURDICK, THE LAW OF CRIME § 276, at 396 (1946) ("actual receipt of money or some *thing* of value") (emphasis added); 4 W. BLACKSTONE, COMMENTARIES 141 (17th ed. 1830) ("any money or thing of value") (quoted in *Evans*, 504 U.S. at 260 n.4).

---

sheep); *Rex* v. *Cheafor*, 2 Den. 361 (1851) (tame pigeons in cage open to air); *Reg.* v. *White*, 6 Cox. 213 (1853) (gas diverted from pipe running into home to avoid utility company meter); *Reg.* v. *Smith*, 7 Cox. 93 (1855) (certificates of shares in foreign railway company entitling the holder to dividends and passed as bank notes); *Reg.* v. *Jones*, 7 Cox. 498 (1858) (copper sundial affixed to wooden pole in churchyard); *Reg.* v. *Morrison*, 8 Cox. 194 (1859) (pawnbroker's duplicate ticket that was a warrant entitling bearer to delivery of the pawned goods); *Ward* v. *People*, 6 Hill 144 (N.Y. 1843) (ice when put away for domestic use); *People* v. *Caryl*, 12 Wend. 547 (N.Y. Sup. 1834) (bank bills of Canadian and Massachusetts banks, if government proved genuineness of bills and existence of banks); *Low* v. *People*, 2 Park. 37 (N.Y. Sup. Ct. 1848) (same); *People* v. *Campbell*, 4 Park. 386 (N.Y. Ct. Gen. Sess.1859) (dog); *Corbett* v. *State*, 31 Ala. 329 (1858) (bank bills); *State* v. *Bond*, 8 Clarke 540 (Iowa 1859) (bank notes); *State* v. *Taylor*, 3 Dutch 117 (N.J. 1858) (oysters); see also *Rex* v. *Headge*, 2 Leach 1033 (1809) (money); *Commonwealth* v. *Rourke*, 10 Cush. 397 (Mass. 1852) (same).

[14] See *Rex* v. *Westbeer*, 1 Leach 12, 13-14 (1739) (parchment writings authorizing the entry on land to ascertain the boundaries of a manor and water levels; reasoning that documents "concerned realty"); *State* v. *Hall*, 5 Harring 492 (Del. Ct. Gen. Sess. 1854) (pipes attached to a building that are severed and carried away in one continuous transaction); *Linnenden's Case*, 1 City. H. Rec. 30 (N.Y. 1842) (bills or notes issued by a city corporation that were not payable in money); *People* v. *Loomis*, 4 Den. 380 (N.Y. Sup. Ct. 1847) (receipt for a supposed repayment of a debt that had not in fact been repaid because it had not been duly executed and delivered and thus was worthless); *Payne* v. *People*, 6 Johns 103 (N.Y. Sup. Ct. 1810) (letter containing information only but of no intrinsic value); *People* v. *Bradley*, 4 Park. 245 (N.Y. Super. Ct. 1858) (simple receipt by a creditor of payment of a debt); *Johnson* v. *People*, 4 Den. 364 (N.Y. Sup. Ct. 1847) (bank bills where there was no evidence submitted by the prosecutor that the notes were genuine and the bank that issued them genuine except for evidence that a broker had accepted them).

2. The New York Penal Laws

a. *The definition of extortion.* The Penal Laws adopted by New York in 1881 and 1909 both defined extortion in exactly the same way as the Field Code. See N.Y. PENAL LAW § 552 (1881) ("Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."); N.Y. PENAL LAW § 850 (1909) (same). There is no indication that the New York legislature intended these provisions to expand the definition of extortion beyond that contained in the Field Code, and the repetition of the Field Code's language suggests the opposite.

New York's extortion provision did not define "property." Here again, it is reasonable to infer that the New York legislature, in adopting the Field Code, also intended to incorporate its concept of "property." That inference is reinforced by an examination of several other provisions of Article 80 of the 1909 Penal Code; Article 80 contained the definition of extortion (in Section 850) as well as various provisions relating to extortion or other crimes involving threats. *E.g.*, N.Y. PENAL LAW § 851 (1909) (defining "fear" for purposes of extortion and separate crime of "compulsion to execute instrument"); *id.* § 852 (setting forth punishment for extortion); *id.* § 853 (defining crime of compulsion to execute instrument); see App., *infra*, 3a-4a.

Of particular interest are Sections 852 and 853. Section 852 acknowledged the close connection – rooted in the common law[15] – between extortion and robbery. It provided: "A person

---

[15] Private (as opposed to official) extortion owes its origins to the common-law crime of robbery, which in turn is an outgrowth of larceny. 2 W. LAFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8 (1986). Of particular interest here, larceny required a "caption," *i.e.*, the taking (or exercise of physical dominion over) the subject property by the defendant. *Id.* § 8.3, at 346. At common law, robbery was essentially aggravated larceny. See 4 BLACKSTONE at 242-43. It required a showing of every element of larceny as well as that the property was taken (1) from the person or presence of another, and (2) through the use of force or putting the victim in fear. 2 LAFAVE & SCOTT § 8.11, at 437-38. "Fear" was generally understood to encompass fear of immediate bodily injury or death to the victim, his family,

who extorts money or other property from another, under circumstances not amounting to robbery, by means of force or a threat * * *, is punishable by imprisonment not exceeding fifteen years." N.Y. PENAL LAW § 852 (1909). New York courts also recognized that extortion was an extension of the crime of robbery. See *People* v. *Griffin*, 2 Barb. 427 (N.Y. Sup. Gen. Term 1848). Robbery, of course, covered only a narrow range of tangible property – property that could be taken "from the person or in the presence of another." N.Y. PENAL LAW § 2120 (1909); note 15, *supra*.

Also instructive is Section 853, which provided that "[t]he compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property *within the last two sections*." N.Y. PENAL LAW § 853 (1909) (emphasis added). The "last two sections" – 851 and 852 – define the type of threats that will give rise to "fear" and, as just explained, set the penalty for extortion. Pointedly, Section 853 does *not* refer to Section 850, which defines extortion as the "obtaining of property from another." Thus, the conduct described in Section 853 was *not* already included within the language of Section 850. In other words, inducing someone to execute or destroy a valuable security is not "obtaining of property from another" within the meaning of Section 850.[16]

---

or someone of his acquaintance, as well as fear caused by a threat to destroy the victim's home or accuse the victim of certain crimes. *Id.* at 447-51. Because robbery was a capital offense, courts were reluctant to extend it to other threats. *Id.* at 459. The crime of private extortion was developed in part to fill these gaps.

[16] Section 851 (which was also drawn from the Field Code) defined the kinds of threats that could give rise to a "wrongful use of * * * fear" for purposes of extortion. N.Y. PENAL LAW § 851 (1909) (see App., *infra*, 3a). In several early cases, the New York courts adopted a broad definition of the types of threatened injuries to "person or property" that would give rise to "fear" within the meaning of the extortion statute. See, *e.g.*, *People* v. *Barondess*, 31 N.E. 240, 241-42, 243 (N.Y. 1892) ($100 obtained by threatening manufacturer to prevent striking workers from returning); *People* v. *Warden*, 145 A.D. 861 (N.Y. App. Div. 1911) (money obtained from employee by threatening to have employee discharged); *People* v. *Weinseimer*, 117 A.D. 603 (N.Y. App. Div. 1907) (money and promissory notes obtained by threatening to prevent workers from returning to a job); *People* v. *Wilzig*, 4 N.Y. Crim. Rep. 403 (N.Y. County Ct. 1886) ($1000 obtained from restaurant owner by engaging in organized effort to boycott his business, picket in front of it, and inflict direct injury on tangible property). In each of these early cases, however, the "property" that was the subject of the extortionate demand – and thus "obtained from another" – was either money or promissory notes. New York courts recognized the distinction between property "obtained" under Section 850 and threatened injuries to "person or property" under Section 851. See *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959).

Finally, we note that the larceny provision of the 1909 Code also set forth a relatively narrow definition of "property," which included "any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind." N.Y. PENAL LAW § 1290(1) (1909).[17] Even that definition, which is broader than the scope of "property" that could be the subject of extortion under the Field Code, does not begin to approach respondents' theories in this case.

b. *The distinct crime of coercion.* Significantly, the New York Penal Code recognized "coercing another person" as a separate (and less serious) crime than the felony of extortion. Section 530 of the Penal Code provided:

> A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or abstain from doing, wrongfully and

---

[17] Although New York's General Construction Law separately defined the terms "personal property," "real property," and "property," these definitions applied only to "a statute where its general object, or the context of the language construed, or other provisions of law, do not indicate that a different meaning is intended." *In re Bronson*, 150 N.Y. 1, 5 (1896). In *People* v. *Ashworth*, 222 N.Y.S. 24, 28-29 (N.Y. App. Div. 1927), the court in reversing a larceny conviction refused to apply the definition of "personal property" contained in the General Construction law. Moreover, the term "personal property" was also used in the closely related context of New York's robbery statute, which was the model for the definition of robbery in the Hobbs Act. See N.Y. PENAL LAW § 2120 (1909); note 9, *supra*.

unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or * * *

3. Uses or attempts the intimidation of such person by threats or force, [i]s guilty of a misdemeanor.

N.Y. PENAL LAW § 530 (1909) (emphasis added) (see App., *infra*, 2a-3a). "Extortion protects property; coercion protects autonomy." Blakey & Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1657 (1996).

3. The Pre-1946 Case Law Under The New York Statutes Cannot Be Squared With Respondents' Extortion Theories

a. *"Property"* – We have located *no case* decided under New York law prior to the Hobbs Act's enactment where the "property" that was "obtained" by the convicted extortionist was held to be anything other than money or tangible things of value (including bills and notes). And by no means did New York accept the kinds of extravagant "property" theories advanced by respondents and embraced by the court below. For one thing, New York courts did not consider "property" to be synonymous with any valuable "rights." Illustrative is *People* v. *Learman*, 28 N.Y.S.2d 360 (N.Y. App. Div. 1941), where the court reversed an extortion conviction of a police officer who had obtained $80 from the victim based on a threat to cause the victim to lose his driver's license. A driver's license, the court reasoned, is properly categorized as a "privilege" or a "right," not as "property." *Id.* at 365. The court also noted (*ibid.*) that in Section 854 of the Penal Law, which punishes "oppression" by public officials, the legislature punished an act "whereby another person is injured in his person, property, *or rights*." N.Y. PENAL LAW § 854 (1909) (emphasis added). Thus, the court reasoned, the legislature knew how to penalize injuries to rights, but chose not to in enacting Sections 850 and 851. *Learman*, 28

N.Y.S.2d at 365.

Extortion under New York law likewise did not include the mere interference with contractual relations – including that of a business with its employees – of the sort alleged by respondents. For example, in *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959), the court held that a store owner's freedom to contract with vendors of his choice (as opposed to vendors forced on it by a local union) could not be the subject of extortion. See also *People* v. *Weisbard*, 248 N.Y.S. 399, 401 (City Mag. Ct. 1931) (assumption of an obligation under a contract may not be the subject of larceny).[18]

Moreover, at the time the Hobbs Act was passed, New York case law suggested that nontransferable rights did not qualify as "property" within the meaning of the crime of extortion. See *Learman*, 28 N.Y.S.2d 365 ("The fact that an operator's license *is not transferable or assignable* shows that it is not property.") (emphasis added). There is no basis in this record to conclude that the clinics' contractual rights involving their physicians and other employees were transferable or assignable. In fact, it would be highly anomalous if they were. See also CORPORATE COUNSEL'S GUIDE TO EMPLOYMENT CONTRACTS § 1.089 (1999) (employment contracts "almost by definition" involve "unique personal services" and therefore typically "include a provision prohibiting assignment").

As for the "right of the clinics to provide medical services," that too appears to fall outside of the "property" that New York

---

[18] Of course, interference with a business's contractual rights vis-à-vis its employees – or its relationship with its customers – is regulated by tort law in New York and other States. See W. KEETON ET AL., PROSSER & KEETON ON TORTS §§ 129-130, at 978-1031 (5th ed. 1984) (describing torts of interference with contractual relations and interference with prospective advantage); see also, *e.g.*, *A.S. Beck Co.* v. *Johnson*, 153 Misc. 363, 365, 370, 274 N.Y.S. 946 (Sup. Ct. 1934) (granting injunction to restrain picketing activities that interfered with customers); *A.L. Reed Co.* v. *Whiteman*, 238 N.Y. 545 (1924) (upholding order enjoining defendants from inducing plaintiff's employees to break their contracts, and from persuading future and current employees not to work for plaintiff).

case law recognized could be the subject of extortion.[19] Illustrative in this connection is *People* v. *Ashworth*, 222 N.Y.S. 24, 28-29 (N.Y. App. Div. 1927), a case involving defendants who had surreptitiously used the spinning facilities of a factory owned by another person to spin wool into yarn. In reversing their convictions for larceny, the New York court explained:

> It is reasonably clear * * * that all intangible personal property is not the subject of larceny, at least under section 1290 of the Penal Law as now worded. For instance, the *right to produce oil* is personal property [under the General Construction Law's definition] * * *. But it seems that it would be impossible to steal such property. * * * Take the case of a franchise. This is an incorporeal hereditament, intangible, invisible * * *. It is not easy to conceive of such a thing being the subject of larceny.

Id. at 28 (emphasis added). The same logic would appear to foreclose respondents' claim.

Finally, there was no basis whatsoever in New York extortion law at the time the Hobbs Act was passed for the notion that a person's right to seek services offered to the public was "property" that could be the subject of extortion. At best, that was a liberty interest or right, not a property interest.[20]

---

[19] The respondents have at various points defined this "right" in much broader terms. For example, they argued at the petition stage that petitioners "obtained" the clinics' "right to make business decisions free from outside pressure." Br. in Opp. 17. In other words, the "property" purported to be at issue was not just a right to be a supplier of abortion services, but also the right to make operational decisions. If that is extortion, however, then so is any conduct that trenches on the freedom of a business or facility to operate.

[20] More than two decades *after* the passage of the Hobbs Act, New York courts, construing a new penal code enacted in 1965, *did* expand the definition of "property" that can be obtained in the new crime of "larceny by extortion" to include such intangible property interests as a "milk route which has a pecuniary value" (*People* v. *Wisch*, 296 N.Y.S.2d 882, 886 (N.Y. Sup. Ct. 1969)), the right of a garbage company under an at-will arrangement to provide services to a particular restaurant (*People* v. *Spatarella*, 34 N.Y.2d 157, 161-62 (1974)), and a tenant's non-assignable right to occupy and possess an apartment (*People* v. *Garland*, 69 N.Y.2d 144, 147 (1987)). These

b. *"Obtaining"* – We have likewise located no extortion cases in this time frame where the property "obtained" by the defendant was not the subject of a transfer or acquisition. See also *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959) ("'Obtaining of property from another' imports not only that he give up something, but that the obtainer receive something.").[21] This strongly suggests that New York extortion law in 1946 required a true "obtaining" and recognized only a limited type of property. As the trial court in this case acknowledged, the "concept of obtain separate from property makes very little sense in the context of intangible rights" (Tr. 4328).[22]

In sharp contrast, the New York *coercion* statute was used repeatedly before 1946 to prosecute threats to business interests of the kind asserted by respondents in this case. In *People* v. *Ginsberg*, 262 N.Y. 556 (1933), a coercion conviction was affirmed based on the defendant's threats to injure the victim's property if the victim store owner did not become a member of

---

cases, however, obviously cannot inform Congress's intent in 1946 concerning an earlier New York statute. See *Evans* 504 U.S. at 268 n.15.

[21] Other States besides New York adopted extortion statutes that were based on the Field Code. See Kadish, *supra*, 19 RUTGERS L.J. at 537. But in those jurisdictions as well, we have been unable to find any cases before 1946 holding that the extortionate "obtaining" of "property from another" included conduct even remotely resembling that involved in this case. Instead, those cases all involve "property" in a very narrow sense. See, *e.g.*, *People* v. *Robinson*, 20 P.2d 369, 369-70 (Cal. App. 1933); *Wilbur* v. *Blanchard*, 126 P. 1069, 1070 (Idaho 1912); *State* v. *Coleman*, 110 N.W. 5, 6 (Minn. 1906); *State* v. *Prince*, 284 P. 108, 109 (Utah 1930). But cf. *People* v. *Cadman*, 57 Cal. 562, 564 (1881) (dicta) ("[a]ssuming" for purposes of appeal that "the right to prosecute an appeal" is property).

[22] Although the record attributes this statement to the trial judge, this may well be a transcription error (read in context, the statement appears to have been made by respondents' counsel). To the extent that respondents argued that even a temporary interference with the freedom to obtain clinic services was extortion (see page 6, *supra*), that theory also ignored the requirement that a defendant have an intent to permanently acquire the victim's property. See, *e.g.*, *People* v. *Kenny*, 119 N.Y.S. 854, 855 (N.Y. App. Div. 1909) (reversing larceny conviction where defendant temporarily took horse and wagon "to have a little fun").

a local trade association and remove certain signs from his store windows. In *People* v. *Scotti*, 266 N.Y. 480 (1934), and *People* v. *Weil*, 273 N.Y. 653 (1937), defendants were found guilty of coercion for compelling the victim manufacturers, through threats and force, into entering agreements with labor unions. And in *People* v. *Kaplan*, 240 A.D. 72 (N.Y. App. Div. 1934), coercion was established where defendants had used violence and retaliatory activity (expelling victims from a labor union) to compel the victims into dropping certain lawsuits. These cases confirm that the conduct underlying respondents' claims was not punishable as "extortion" under New York law in 1946.

C. The Legislative History Of The Hobbs Act Confirms Congress's Intent To Adhere To The Limitations Adopted Under New York Law And Not To Punish Coercion

Against the backdrop of the Field Code and New York provisions described above, Congress passed the Hobbs Act and, before it, the Federal Anti-Racketeering Act of 1934. As the legislative history of both statutes makes clear, Congress had a narrow objective in mind: to address the specific problem of "rackets" then being used by gangsters and organized crime to extract payments and other "tribute" from businesses. Moreover, in response to concerns voiced by organized labor, Congress narrowed the scope of both the 1934 Act and the Hobbs Act during their consideration, ensuring that the latter would not reach acts of coercion. Indeed, in passing the Hobbs Act, Congress eliminated all traces of coercion from the 1934 Act and replaced it with the more serious crime of *robbery*, while at the same time adopting the traditional definitions of that crime and of *extortion*.

1. The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, included language strikingly similar to that carried forward in the Hobbs Act. See App., *infra*, 1a-2a; *United States* v. *Culbert*, 435 U.S. 371, 375 n.5 (1978). Section 2(b) of the 1934 Act provided that "[a]ny person who, in connection with or in relation to any act in any way or degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce – * * * *obtains the property of another*, with his consent, induced by wrongful use of force or fear, or under color of official right * * * shall be guilty of a felony." 48 Stat. 979, ch. 569, § 2(b) (emphasis added). Section 2(a) separately punished anyone who with a similar effect on interstate commerce "[o]btains or attempts to obtain, by use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services." *Id.*§ 2(a). The Act expressly excluded "the payment of wages by a bona-fide employer to a bona-fide employee." *Id.* §§ 2(a), 3(b).

The 1934 Act was passed as part of a flurry of legislative activity immediately following the repeal of prohibition. See Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 228-35 (1984). During the summer and fall of 1933, Senator Copeland of New York had "led a subcommittee of the Commerce Committee around the country * * * to hold hearings" (*id.* at 230) on the problems caused by "the activities of predatory criminal gangs of the Kelly and Dillinger types." S. Rep. No. 1440, 73d Cong., 2d Sess. 1 (1934). On January 11, 1934, Senator Copeland introduced 13 bills aimed at combating racketeering and gangsterism. *United States* v. *Local 807*, 315 U.S. 521, 528-29, 531 (1942); S. Rep. No. 1440, at 1.[23] Among these bills was S. 2248, a measure aimed at curbing "'the typical racketeering activities affecting interstate commerce'" (including "'economic *extortion* directed by professional gangsters'"). H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (emphasis added) (quoting letter of Att'y Gen. Cummings).

As passed by the Senate, S. 2248 was much broader than the enacted statute. See 78 CONG. REC. 5734-35 (1934) (reprinting bill). Among other things, S. 2248 included two subsections

---

[23] The Copeland subcommittee's working definition of "racketeering" included organized conspiracies to "commit the crimes of *extortion or coercion*, or attempts to commit extortion or coercion, *within the definition of these crimes found in the penal law of the State of New York* and other jurisdictions." S. Rep. No. 1189, 75th Cong., 1st Sess. 3 (1937) (emphasis added).

that expressly covered acts of coercion or attempted coercion. S. 2248, 73d Cong. § 2(3), (4) (1934). It also included a subsection focusing on extortion, which criminalized "extort[ing]" or "attempt[ing] to extort money or other valuable considerations" and imposed a penalty of "imprisonment of 1 to 99 years" as well as "a fine which shall be commensurate with the amount of the unlawful gain." *Id.* § 2(2).

After organized labor objected to that broad language, see 78 CONG. REC. 5859 (1934), the Justice Department worked with labor leaders to produce a much narrower version of the bill, which the House passed. H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (letter of Att'y Gen. Cummings); 78 CONG. REC. 11,482 (1934). The revised version omitted the broad coercion provisions in the earlier bill and recast the extortion provision (§ 2(b)) so that it tracked the language of the Field Code. The only remaining mention of coercion (in § 2(a)) was a reference to compelled "purchase or rental of property or protective services" – acts that, by their nature, involve the payment of money – and compelled "payment of money or other valuable considerations."

2. The decision in *United States* v. *Local 807*, 315 U.S. 521 (1942), was the impetus for passage of the Hobbs Act in 1946. The case involved officials and members of a union in New York City who had conspired to use and had used violence and threats to obtain payments from out-of-state truck drivers who wished to make deliveries (and pick up merchandise for the return trip) within the local's territory. 315 U.S. at 526. In reversing convictions under Sections 2(a) and (b) of the 1934 Act, this Court held that the exception for "wages paid by a bona-fide employer to a bona-fide employee" largely shielded the defendants from liability under Sections 2(a) and (b).

3. "Congressional disapproval of this decision was swift." *United States* v. *Enmons*, 410 U.S. 396, 402 (1973). To overrule *Local 807*, Congress passed the Hobbs Act. *Id.* at 403; *Culbert*, 435 U.S. at 376-77; *United States* v. *Green*, 350 U.S. 415, 419 (1956). Congress reaffirmed its objective of stopping "those persons who have been impeding interstate commerce and

levying tribute from free-born American citizens." H.R. Rep. No. 238, 79th Cong., 1st Sess. 10 (1945) (emphasis added). In its definition of "extortion," the Hobbs Act carried forward the language of Section 2(b) of the 1934 Act without significant change. See *Evans*, 504 U.S. at 262. At the time Congress acted, no court had interpreted Section 2(b) of the 1934 Act as extending beyond extortion as defined in the Field Code.[24]

Tellingly, the Hobbs Act replaced Section 2(a) of the 1934 Act with a provision outlawing interference with interstate commerce by "robbery." Congress was well aware of the New York coercion statute when it first considered amending the 1934 Act. See *Hearings on H.R. 5218, H.R. 6752, H.R. 6872, and H.R. 7067 Before the Subcommittee No. 3 of the House Committee on the Judiciary*, 77th Cong., 2d Sess 213-14 (1942) (quoting coercion statute). Labor representatives vigorously opposed any reference in the various bills to "coercion" – or to continuation of Section 2(a) of the 1934 Act, which included a very limited reference to coercion – on the ground that this crime was too amorphous and could jeopardize the rights of unions. See *id.* at 126, 154, 158, 227, 233-34. According to Representative Hobbs, these concerns prompted him to redraft the bill to omit Section 2(a) of the 1934 Act and employ instead the traditional crimes of "extortion" and "robbery." 91 CONG. REC. 11,912 (1945) (remarks of Rep. Hobbs); *Culbert*, 435 U.S. at 377.

---

[24] In every published opinion between 1934 and 1946 describing the nature of an extortion prosecution under the 1934 Act, the extortionist sought to extract *money* from the victim or victims. See, *e.g.*, *United States* v. *Local 807*, 315 U.S. at 626-27 (payments from truck drivers); *Ladner* v. *United States*, 168 F.2d 771, 773 (5th Cir.) (payments from truck operators), cert. denied, 335 U.S. 827 (1948); *United States* v. *Compagna*, 146 F.2d 524, 525 (2d Cir.) (conspiracy to extort money from producers and exhibitors of motion pictures), cert. denied, 324 U.S. 867 (1945); *United States* v. *Hirsch*, 136 F.2d 976, 977 (2d Cir.) (perjury before grand jury investigating "moneys extorted by racketeers" from motion picture industry), cert. denied, 320 U.S. 759 (1943); *Nick* v. *United States*, 122 F.2d 660, 667 (8th Cir.) (payoffs in exchange for concessions in labor contracts), cert. denied, 314 U.S. 687 (1941); *United States* v. *McGlone*, 19 F. Supp. 285, 286 (E.D. Pa. 1937) (obtaining payment of money).

As this history shows, Congress carefully framed the language of the Hobbs Act to punish extortion but not coercion.[25] Congress's decision to incorporate the traditional definition of extortion, moreover, was intended to eliminate ambiguity and ensure that only very serious criminal acts would be reached. To achieve those ends, Congress employed the terms "robbery or extortion" – words that "have been construed a thousand times by the courts. Everybody knows what they mean." 91 CONG. REC. 11,912 (1945) (remarks of Rep. Hobbs); *id.* at 11,900 (remarks of Rep. Hancock) ("The courts of the States of this county have tried thousands of cases of robbery and extortion. They know what those crimes are."). It also replaced the broader provisions of the 1934 Act with the more serious offense of robbery. The Seventh Circuit's decision is manifestly inconsistent with Congress's intent as reflected in this history.

D. The Seventh Circuit's Broad Definition Of Extortion Should Be Rejected For Other Reasons As Well

Beyond the flaws noted above, the Seventh Circuit's analysis should be rejected because it ignores the rule of lenity, threatens to federalize vast expanses of state criminal law, goes beyond even the broad definitions of "property" recently endorsed by certain federal courts, creates serious ambiguities, and would lead to absurd and undesirable consequences.

1. Even if the Court were to conclude that the language and legislative history of the Hobbs Act do not *compel* the foregoing interpretation of the terms "property" and "obtaining," our view is at least a reasonable one. Under the rule of lenity "ambiguity concerning the ambit of criminal statutes should be resolved in

[25] Every example of extortion given during the legislative debate on the Hobbs Act involves an "obtaining of property from another" in the sense long used by the New York courts (as described above). See, *e.g.*, 91 CONG. REC. 11,907 (1945) (remarks of Rep. Fellows) (referring to compelled "payment to the[] extortionist] of a day's wage"); 89 CONG. REC. 3194 (1943) (Rep. Fish) ("extorting or attempting to extort fees from helpless farmers"). See also 91 CONG. REC. 11,908 (1945) (Rep. Walters) ("I call the gentleman's attention to the fact that a mere threat does not constitute a crime. There must accompany that threat an unlawful *taking*.") (emphasis added).

favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). As the Court recognized recently in *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000), "[t]his interpretive guide is especially appropriate" in construing the Hobbs Act, because, like the mail fraud statute at issue in that case, the Hobbs Act "is a predicate offense under RICO." The rule of lenity should be dispositive here.

2. The Seventh Circuit's definition should also be rejected because of its potential to federalize all manner of traditional state offenses – such as trespassing and breach of the peace – into Hobbs Act violations punishable by 20-year sentences. Courts must not be "quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). There is no reason to permit such a "sweeping expansion of federal criminal jurisdiction." *Cleveland*, 531 U.S. at 24.

3. The Seventh Circuit's conclusion that petitioners "obtained" the "property" of the clinics and their patients is also difficult to reconcile even with some of the extremely broad definitions of those terms that some federal courts have adopted in recent years.[26] For example, even the Second Circuit, which has adopted a sweeping understanding of "property," nonethe-

[26] The reasons for this judicial departure from the traditional meaning of extortion are not difficult to find. Many of the earliest federal decisions are predicated on a complete failure to distinguish between the concept of "property" that must be "obtained * * * from another" and the much broader notion of the threatened "injuries to person or property" that can give rise to "fear." See note 16, *supra*. See, *e.g.*, *United States* v. *Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). Others rely on cases decided in New York decades after the Hobbs Act was passed. See note 20, *supra*. Finally, in the half-century since the Hobbs Act was enacted, American law and jurisprudence have experienced a remarkable expansion in the concept of property. See, *e.g.*, Reich, *The New Property*, 73 YALE L.J. 733 (1964); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); see also *United States* v. *Bellomo*, 176 F.3d 580, 593 (2d Cir.) (right to democratic participation in a union election is "property"), cert. denied, 528 U.S. 987 (1999).

less limits that concept to valuable rights that are "considered as a source or element of wealth." *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101-02 (2d Cir. 1990). A woman's right to seek services offered by a clinic plainly is not "a source or element of wealth."[27]

Of course, that fact that these expansive theories of extortion were not developed by the federal courts until more than 30 years after the enactment of the Hobbs Act (and its predecessor provisions in the 1934 Act) is yet another reason to doubt their validity. *Enmons*, 410 U.S. at 410 ("It is unlikely that if Congress indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved."); *McCormick*, 500 U.S. at 277 (Scalia, J., concurring) (noting that "[f]or more than 30 years after enactment" of the Hobbs Act and its predecessor, the 1934 Act, there was "no indication that it applied to the sort of conduct alleged here"); note 24, *supra*.

4. If endorsed by this Court, the Seventh Circuit's view that any "loss to, or interference with the rights of, the victim" constitutes "extortion" as long as some "valuable right" – including presumably any interest in intangible property and most if not all "valuable" liberty interests – is impaired would create serious ambiguities and uncertainties. For example, how is one to discern which interests are excluded under the Seventh Circuit's test? How do courts assess whether intangible property or liberty interests are "valuable"? Does the interference with a money-losing business (or the operation of a non-profit facility) result in the loss of valuable "property"?

Equally problematic, the lower court's approach unacceptably blurs the line between extortion, which requires the obtaining of property with the owner's "consent," and robbery, which requires the taking of personal property "against the will" of the victim. See 01-1118 Pet. 23 n.13. This case is a good example. When is the voluntary shutdown of a clinic the product of induced consent and when is it accomplished against the facility's will? If the shutdown is consensual, when does the consent occur (so that the crime of extortion is complete)? Any definition of "obtaining" the "property" of another that gives rise to such serious uncertainties should be rejected out of hand. See *McNally*, 483 U.S. at 360 (federal criminal statute should not be construed to "leaves its outer boundaries ambiguous").

5. If the lower courts' interpretation were correct, RICO actions based on predicate Hobbs Act offenses could be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights – a point respondents conceded in closing argument. Tr. 4963 (RICO "enterprise" could consist of "an animal rights group that bars entry to a restaurant that serves veal"). In addition, the scope of official extortion would expand to cover all manner of official conduct. And virtually any act of coercion having a negative effect on an interest or right that is said to be "valuable" would violate the Hobbs Act – and be actionable under RICO if there are two or more such acts comprising a pattern within a ten-year period. As explained above, Congress deliberately omitted any mention of coercion when it passed the Hobbs Act in 1946. Moreover, Congress could have made coercion a predicate crime under RICO, but it chose not to do so. See *United States* v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992).[28]

---

[27] It is not clear that the clinics' right to offer services – whether on a for-profit or not-for-profit basis – would qualify as "property" even under the broader reach of the mail fraud statute. See, *e.g.*, *United States* v. *Henry*, 29 F.3d 112, 114-16 (3d Cir. 1994) (banks' right to fair opportunity to bid for potential deposits is not "property"); *Lancaster Community Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405-06 (9th Cir. 1991) (hospital's attempt to take away market share of a competitor does not involve any taking of "property").

[28] There are at least four additional reasons to doubt that Congress intended the Hobbs Act to be used in conjunction with RICO against political protesters. First, as the legislative history of RICO makes clear, an early version of the statute was narrowed in response to concerns expressed by the Justice Department and ACLU that it was too broad and might be applied to anti-war protesters. Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 696-97

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968). In addition to its criminal proscriptions, RICO includes a civil remedies provision, 18 U.S.C. § 1964, which authorizes the Attorney General (*id.* § 1964(b)) to initiate civil proceedings to remedy RICO violations. Section 1964(c) also authorizes any "person" who is "injured in his business or property" to bring suit and recover "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).[29]

In the more than 30 years since RICO was enacted, nearly every court to opine on the issue has concluded that Section 1964(c) does not (or at least expressed serious doubt that it does) authorize private parties to go beyond the remedies specified by Congress and obtain *injunctive* relief. See 01-1119 Pet. 11 &. nn.16-18 (collecting cases). In the decision below, the Seventh Circuit became the first appellate court to hold that private injunctions are available. The court's reasons for breaking with 30 years of precedent, however, do not withstand analysis.

(1999). Second, as explained below, RICO was modeled after the antitrust laws, which do not reach political protest activities (including boycotts by individuals who are not seeking an economic advantage). See *FTC* v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S.411, 426-27 (1990). Third, it is difficult to see why Congress in 1994 would have enacted the Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248, if it believed that RICO, combined with the Hobbs Act, *already* reached the physical obstruction of access to abortion clinics. And fourth, RICO's severe criminal penalties and forfeiture provisions, and its quasi-punitive provision for treble damages, make its application to political protesters singularly inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

[29] For the sake of simplicity we use the terms "private party" and "person" interchangeably throughout this brief. There is, however, some uncertainty about whether some governmental units are "persons" that may sue and be sued under civil RICO. See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS 36-37 & n.39 (2000) ("*DoJ RICO Manual*").

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief

1. Section 1964(c) allows private parties who are injured to bring suit for treble damages, costs, and attorney's fees. As this Court has "repeatedly observed," "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992) (citing cases). "[E]ven a cursory comparison * * * reveals that the civil action provision of RICO was patterned after [Section 4 of] the Clayton Act," *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987), which, in turn, was "borrowed from Section 7 of the Sherman Act," *Holmes*, 503 U.S. at 267.

Section 1964(c) provides, in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *.

At the time RICO was adopted in 1970, Section 4 of the Clayton Act provided, in relevant part (Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a)) (see App., *infra*, 6a)):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

At the time the Clayton Act was adopted in 1914, Section 7 of the Sherman Act provided, in relevant part (Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210 (repealed 1955) (see App., *infra*, 5a-6a)):

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor * * * and shall recover threefold the damages by

him sustained, and the costs of suit, including a reasonable attorney's fee.

In *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), and *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904), this Court held that Section 7 of the Sherman Act did not allow parties other than the federal government to seek injunctive relief. Congress's intent "was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, * * * to those instituted in the name of the United States." *Northern Securities*, 194 U.S. at 71. "[A] private person cannot maintain a suit for an injunction under § 4 of the [Sherman Act]." *Paine Lumber*, 244 U.S. at 471; see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941) (Sherman Act "envisaged two classes of actions[] – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury").

A *different* provision of the Clayton Act – not the model for Section 1964(c) or any other provision of RICO – expressly authorizes private injunctive relief. Section 16 of the Clayton Act provides, in relevant part, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *." Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (codified at 15 U.S.C. § 26) (see App., *infra*, 6a-7a). "[T]he sole purpose of § 16 * * * was to extend to private parties the right to sue for injunctive relief." *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 634 n.5 (1977) (plurality); *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990).

This Court credits the "Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4." *Holmes*, 503 U.S. at 268. Congress "used the same words," so "we can only assume it intended them to have the same meaning that courts had already given them." *Ibid.*; see also *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*,

459 U.S. 519, 534 (1983) ("When Congress enacted § 4 of the Clayton Act * * * it adopted the language of § 7 [of the Sherman Act] and presumably also the judicial gloss * * *."). Thus, the language of Section 1964(c) must be understood as having the same meaning as the virtually identical language of Section 7 of the Sherman Act and Section 4 of the Clayton Act.

This Court has repeatedly relied on Congress's decision to model Section 1964(c) after these antitrust precursors in determining the meaning of RICO's civil enforcement scheme. See *Holmes*, 503 U.S. at 267 (Section 1964(c) includes a proximate causation requirement because federal courts had read a similar requirement into the precursor provisions of the Sherman and Clayton Acts); *Agency Holding*, 483 U.S. at 150-156 (Clayton Act's 4-year statute of limitations applies to suits brought under Section 1964(c)); *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (RICO's "civil enforcement scheme parallel to the Clayton Act regime" incorporates antitrust accrual precedent); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188-191 (1997).

The reasons to rely on the antitrust models are especially strong in this case. This case does not involve filling in an indispensable concept left out of civil RICO (such as the statute of limitations) with a principle taken from Section 4 of the Clayton Act. Instead, it involves the meaning of *statutory language* – creating a private right of action for treble damages and specifying the available remedies – that is *virtually identical* in Section 1964(c) and its antitrust predecessor provisions.

In "reject[ing] this line of analysis," the Seventh Circuit gave two utterly implausible reasons. 01-1118 Pet. App. 13a. First, the panel stated that "the mere fact that the Clayton Act spreads it remedial provisions over a number of different sections of the U.S. Code and RICO does not, adds little to our understanding of either statute." *Ibid.* But Congress did not carve up language in one statute and reallocate it to different places in another; one statute (the Clayton Act) has entirely *different* language not included *anywhere* in RICO.

Second, the court of appeals reasoned that this Court has

"regularly treat[ed] the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language." 01-1118 Pet. App. 13a (citing *Klehr* and *Holmes*). But the inclusion of the express authorization of private injunctive relief in Section 16 of the Clayton Act, contrasted with its omission from RICO, is hardly a "superficial difference[] in language." And the remedial provisions of RICO that *Klehr* and *Holmes* "treated * * * identically" are Section 1964(c) of RICO and Section 4 of the Clayton Act. That any wording difference in *those* two provisions is "superficial" proves our point.

2. The Seventh Circuit purported to find evidence to support its reading in the remainder of Section 1964 – and in particular in Sections 1964(a) and (b). That was error.

Sections 1964(a) and (b) provide:

> (a) The district courts of the United States shall have *jurisdiction* to *prevent and restrain* violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * *; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General *may institute proceedings under this section*. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

18 U.S.C. § 1964(a), (b) (emphasis added).

The notion that Congress's inclusion of Sections 1964(a) and (b) reflects an intent to expand the meaning of Section 1964(c) beyond its antitrust-law precursors runs up against an insurmountable problem: both the Sherman Act and the Clayton Act *also* included provisions (1) granting equitable jurisdiction to the district courts to "prevent and restrain" violations and (2) authorizing the United States to "institute proceedings"

under those statutes. Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25); see App., *infra*, 5a-6a. In the Clayton Act, Congress saw fit to add a separate provision – Section 16 – which expressly grants private parties the right to seek injunctive relief. Clayton Act, § 16, 38 Stat. 737 (App., *infra*, 6a-7a). RICO, by contrast, contains no such provision. Sections 1964(a) and (b) accordingly reflect no intent to authorize private injunctive relief.

Even apart from this historical context, which the Seventh Circuit ignored, the language of Sections 1964(a) and (b) does not support the result below. Although Section 1964(a) provides that district courts "shall have jurisdiction to" order a variety of equitable remedies, it does not state who is entitled to invoke that jurisdiction. Section 1964(b) broadly authorizes the Attorney General to "institute proceedings" under Section 1964. According to the Seventh Circuit, the Attorney General's authority to seek permanent injunctive relief "comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)." 01-1118 Pet. App. 8a.[30]

---

[30] The Attorney General's unrestricted right to "institute proceedings under this section" necessarily carries with it the right to seek all available equitable remedies that federal courts have jurisdiction to grant pursuant to Section 1964(a). Indeed, the reference to "proceedings" in Section 1964(b) is almost certainly an abbreviation for "proceedings in equity," the term used in the precursor provisions of the Sherman and Clayton Acts after which Section 1964(b) was modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). The "prevent and restrain" language of Section 1964(a) similarly reveals a focus on proceedings in equity (as opposed to the "suit[s]" for "damages" authorized under Section 1964(c)). See also *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger) (describing Section 1964(c) as "similar to the private damage remedy found in the anti-trust laws" and explaining that "those who have been wronged by organized crime should at least be given access to a *legal* remedy") (emphasis added).

The Seventh Circuit concluded "that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)," 01-1118 Pet. App. 8a, but that analysis overlooks key evidence in the statutory text (as well as the historical evidence set forth above). In contrast to Section 1964(b)'s broad authorization allowing the Attorney General to "institute proceedings under this section" and therefore to invoke the injunctive relief district courts are empowered to issue in such proceedings by virtue of Section 1964(a), Section 1964(c) provides a far more circumscribed right of action. It permits any person who has been "injured in his business or property" as a consequence of "a violation of section 1962 of this chapter" to "sue *therefor*" and specifies that in such a lawsuit the plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." In contrast to Section 1964(b), Section 1964(c) can – and should – be read as an exhaustive list of the remedies available to a "person" authorized to sue for past injuries to "business or property."

The Seventh Circuit was therefore quite wrong to suggest that the first sentences of Sections 1964(b) and (c) are "equivalent" (01-1118 Pet. App. 8a) – a conclusion that the court could reach only by excising the language in Section 1964(c) specifying the remedies provided by Congress. See 01-1118 Pet. App. 8a (stating that Section 1964(c), selectively edited in this way, does not "address[] what remedy the plaintiff may seek"). Where, as here, Congress did not allow private parties to "institute proceedings under this section," but rather only to sue for treble damages and other specified relief, the inference is inescapable that Congress did not intend to allow private parties to invoke the equitable jurisdiction conferred by Section 1964(a). See also pages 45-47, *infra* (describing repeated, unsuccessful proposals to add language to Section 1964 authorizing private parties to "institute proceedings under subsection (a)").[31]

[31] Equally questionable is the Seventh Circuit's conclusion that Section 1964(a) is not "purely 'jurisdictional'" in nature. 01-1118 Pet. App. 8a. That conclusion is difficult, if not impossible, to reconcile with the text of Section 1964(a), which does nothing more than vest the federal district courts with certain "jurisdiction." See also *Tafflin* v. *Levitt*, 493 U.S. 455, 460 (1990) (describing Section 1964(c) as an independent "grant of federal jurisdiction"). Nor does this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), support the Seventh Circuit's analysis. As we explained in our petition for certiorari (at 13-14), *Steel Co.* is far afield from this case.

The legislative history of RICO further demonstrates the error of the Seventh Circuit's view that Section 1964(c) must, "by parity of reasoning" (01-1118 Pet. App. 8a), be regarded as bearing the same relationship to Section 1964(a) as does Section 1964(b). That analysis again overlooks the antitrust models on which Section 1964 was based. Both the Sherman Act and the Clayton Act combined in a single provision the predecessor language on which Sections 1964(a) and (b) were modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). And both included as an entirely separate provision the model for Section 1964(c). This common origin suggests a special relationship between subsections (a) and (b) not shared by subsection (c).

Furthermore, as this Court has acknowledged, the Senate version of the bill that became RICO allowed the Attorney General to seek injunctive relief in civil cases, but did not provide any cause of action for private parties. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 486 (1985). The private treble-damages provision was later added by the House Judiciary Committee and approved by the House. *Id.* at 487-88. In the final version of RICO, the Senate provisions became Sections 1964(a), (b), and (d), *id.* at 486-87, while the House provision became Section 1964(c), *id.* at 487-88. As that history makes clear, Section 1964(c) was a limited, private remedy engrafted onto a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983); see also *In re Fredeman Litigation*, 843 F.2d 821, 829 (5th Cir. 1988). As such, it necessarily bears a different relationship to Section

1964(a) than does Section 1964(b).[32]

3. Even read in a vacuum, Section 1964(c) would not support the Seventh Circuit's reading. In recent years, this Court has repeatedly emphasized that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Given that Congress explicitly granted private parties the right to seek treble damages, costs, and attorney's fees, granting additional rights would be manifestly inappropriate.

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief

In interpreting RICO, this Court has repeatedly looked to

---

[32] The Seventh Circuit's reliance on RICO's liberal construction clause and the "underlying purpose" of the statute (01-1118 Pet. App. 10a-11a) was misplaced. As this Court has stated, the liberal construction clause "is not an invitation" to depart from Congress's intent as "gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-84 (1993); see also *Fredeman Litig.*, 843 F.2d at 830 (liberal construction clause "neither compels nor authorizes" court to "disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at so doing"). Nor does RICO's "underlying purpose" trump the clear evidence in the text, structure, and legislative history of the statute that Congress did not intend to authorize private injunctive relief. In any event, Congress's purpose in enacting Section 1964(c) was both to "remedy economic injury" and to "bring to bear the pressure of 'private attorneys general' on a serious national problem." *Agency Holding*, 483 U.S. at 151. As this Court has pointed out, "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages." *Ibid.*; see also *Rotella* v. *Wood*, 528 U.S. 549, 557-58 (2000) ("The object of civil RICO is * * * not merely to compensate victims but to turn them into prosecutors * * *. The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity * * *."). Moreover, as the Court recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins.* v. *Knudson*, 122 S. Ct. 708, 718 (2002) (quotation omitted).

legislative history for guidance. See, *e.g.*, *Rotella*, 528 U.S. at 557; *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes*, 503 U.S. at 267; *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989). RICO's legislative history further demonstrates that Congress did not intend to authorize private parties to seek injunctive relief.

1. Both the Senate and House entertained – but did not adopt – proposals that would have expressly given private parties the right to seek injunctive relief. In the Senate, S.1623, a predecessor to RICO, included "a private civil cause of action * * * providing explicitly for injunctive relief as well as for treble damages." *Sedima S.P.R.L.*, v. *Imrex Co.*, 741 F.2d 482, 488 n.18 (2d Cir. 1984), rev'd on other grounds, 473 U.S. 479 (1985); see S.1623, §§ 3(c), 4(a), 91st Cong., 1st Sess. (1969); 115 CONG. REC. 6995-96 (1969). So, too, did an earlier Senate bill. See S. 2049, §§ 4(c), 5(a), 90th Cong., 1st Sess. (1967); see also *Sedima*, 473 U.S. at 486-87. "The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S.1623 with S.1861," which did not provide a private civil cause of action. *Sedima*, 741 F.2d at 488 n.18. The bill as passed by the Senate, S. 30, also lacked a private civil cause of action. *Sedima*, 473 U.S. at 486-87.

In the House, competing bills were also introduced. See, *e.g.*, H.R. 19215, 91st Cong., 2d Sess. (1970); H.R. 19586, 91st Cong., 2d Sess. (1970). Like the early Senate bills that never made it into law (S. 1623 and S. 2049), H.R. 19215 included separate subsections authorizing private parties to recover, respectively, treble damages and injunctive relief. In contrast, H.R. 19586 included a provision authorizing only treble damages. "The language of RICO as enacted into law is identical to the language of H.R. 19586." Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1020 n.63 (1980) ("*Basic Concepts*").

Moreover, during the hearings conducted by the House subcommittee to consider S. 30 and other measures, Representative Steiger made a proposal that the committee add to S. 30

not only a private treble-damages provision but also a separate provision authorizing private injunctive relief. *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970). The latter would have provided:

> *Any person may institute proceedings under subsection (a) of this section.* In any action brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of *injunctive relief* from threatened loss or damage in other cases. Upon * * * a showing of immediate danger or irreparable loss or damage, a preliminary injunction may be issued * * *.

Ibid. (emphasis added); see also 116 CONG. REC. 35,346 (1970). As reported out of the Judiciary Committee, however, the bill did not include this provision. See *Sedima*, 741 F.2d at 489 n.20 (noting that subcommittee had "rejected this language and explicitly created only the private action for treble damages which was eventually enacted as § 1964(c)").

Representative Steiger was not content to leave it at that. On October 6, 1970, on the floor of the House he proposed an amendment to the bill that would have added the provision quoted in the preceding paragraph (as well as other provisions, including one drawn from the Clayton Act, as amended, that would have authorized the United States to sue for actual damages). 116 CONG. REC. 35,227-28 (1970). Representative Steiger pointed out that he had urged the subcommittee to "add * * * the additional civil remedies now provided by law for antitrust cases," which "include treble damages actions by private citizens who have been harmed in their business or property, suits for equitable relief for private citizens threatened with such injury, and actions by the United States for actual damages to its business or property." *Id.* at 35,227. He criticized the reported bill on the ground that it "does not do the whole job. It makes the mistake of merely authorizing [treble-damage] suits * * * without granting to the courts the full extent of remedial authority contained in the comparable antitrust laws." *Ibid.*

He continued, "the Judiciary Committee version * * * *fails to provide* * * * important substantive remedies included in the Clayton Act: * * * *equitable relief in suits brought by private citizens*." *Id.* at 35,228 (emphasis added).

During floor debate the next day, Representative Steiger again proposed but later withdrew his amendment to the bill. 116 CONG. REC. 35,346-47 (1970). In urging withdrawal, Representative Poff pointed out that the amendment "offer[ed] an additional civil remedy"; noted that "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains"; and suggested that withdrawal would permit the new remedies to be "properly * * * considered by the Judiciary Committee when Congress reconvenes following the elections." *Id.* at 35,346. In agreeing to this course of action, Representative Steiger stated: "I would like to make it very clear that this is worthy of separate legislation when we do return in the fall or next year." *Id.* at 35,347.

2. The following year, Senators McClellan and Hruska (who introduced the bill that eventually became RICO, see *Agency Holding*, 483 U.S. at 155) introduced S.16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which included a proposed amendment to Section 1964. See 118 CONG. REC. 29,369-70 (1972) (statement of Sen. McClellan). The bill would have added to Section 1964 a provision authorizing private injunctive relief that was virtually identical to the amendment offered by Representative Steiger. Compare *id.* at 29,368 with 116 CONG. REC. 35,346 (1970). As this Court has previously recognized, "the purpose of the bill was to broaden even further the remedies available under RICO" by "permit[ing] private actions for injunctive relief" and other remedies. *Agency Holding*, 483 U.S. at 155 (citing 118 CONG. REC. 29,368 (1972)). There is ample other evidence in the legislative record confirming this conclusion. See *Religious Tech. Center* v. *Wollersheim*, 796 F.2d 1076, 1086 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); OR Br. 17-18 n.16. The Senate passed the bill unanimously, *Basic Concepts* at 1020

n.67 (citing 118 CONG. REC. 29,379 (1972)), but the House did not act on the bill. *Ibid.* RICO, therefore, was never amended.[33]

Thus, there is abundant evidence in RICO's legislative history that Congress intended *not* to authorize private injunctive relief. As the Ninth Circuit correctly observed in *Wollersheim*, "Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief," and, "[o]n each occasion, Congress *rejected* the addition of any such provision." 796 F.2d at 1086 (emphasis added). The Seventh Circuit's refusal to credit this evidence was erroneous.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); see also *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 534 (2001) (courts "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language") (quotations omitted); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). In ignoring that principle, the Seventh Circuit erred.

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO

In the Seventh Circuit's view, "Congress intended the general remedies explicitly granted in § 1964(a)" – including but *not* limited to injunctions – "to be available to all plaintiffs." 01-1118 Pet. App. 10a. That conclusion would arm private litigants with far-reaching and novel equitable remedies. Without good evidence that Congress intended to bring about that extraordinary result, this Court should hesitate to approve it.

Section 1964(a) vests the district courts with broad jurisdiction to "issu[e] appropriate orders, including, but not limited to:

---

[33] Under respondents' view, the Senate's vote to pass S. 16 was a futile act. Notably, a similar measure was again introduced in 1973. OR Br. 18 n.16.

ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * *; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. § 1964(a). As the text makes clear, the examples given are merely illustrative.

In civil RICO actions brought by the United States, the federal courts have granted a broad range of equitable remedies to prevent racketeering activity and eliminate corruption from labor unions and other entities. See *DoJ RICO Manual*, at 283-97 (describing case law). Consistent with the language of Section 1964(a), courts have ordered the divestiture of interests held in a racketeering enterprise. *Id.* at 285-86 & n.10 (citing cases). They have also routinely ordered disgorgement in government suits. See *DoJ RICO Manual*, at 286-87 & n.12 (collecting cases).[34] And they have prohibited defendants, at the request of the government, from pursuing their livelihood in certain geographic areas, associating with co-defendants for commercial purposes, or participating in union activities. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995).

Moreover, the federal courts have at the government's request "frequently appointed officers, also referred to as monitors or trustees, to supervise the activities of the [RICO] enterprise." *DoJ RICO Manual*, at 284. Such monitors and officers have exercised "broad powers, including * * * (1) conduct[ing] the legitimate business of the enterprise; (2) review[ing] and approv[ing] hiring, certain contracts and financial expenditures; (3) impos[ing] and implement[ing] ethical practice codes * * *; (4) investigat[ing], prosecut[ing], and adjudicat[ing] in civil proceedings allegations of violations of the ethical practice codes and other rules; (5) impos[ing] * * * fines, disciplin[ing] or remov[ing] from the enterprise * * * individuals found guilty

---

[34] Disgorgement can involve devastatingly large sums of money. See, *e.g.*, *United States* v. *Philip Morris Inc.*, 116 F. Supp. 2d 131, 134-35, 150-52 (D.D.C. 2000) (seeking "billions of dollars" from eleven entities).

of such violations; and (6) implement[ing] various reforms in the enterprise, including election reform for corrupt union enterprises." *Id.* at 284-85.

What is more, Section 1964(a) expressly authorizes the government to seek corporate *dissolution*. In *California* v. *American Stores Co.*, 495 U.S. 271 (1990), this Court held that Congress's broad authorization under Section 16 of the Clayton Act allowing private parties to "have injunctive relief" included the remedy of divestiture. At the same time, however, the Court distinguished the more drastic or "grave" remedy of corporate dissolution in the sense of an order "terminat[ing] the corporate existence." *Id.* at 292-93; *id.* at 289 (likening dissolution to a "judgment * * * of corporate death") (internal quotations omitted). As the Court noted in *American Stores*, there are strong reasons to believe that private plaintiffs are *not* entitled to the remedy of dissolution under Section 16 of the Clayton Act. *Id.* at 290-94 (citing *Graves* v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) (Hand, J.)). If so, then it is difficult to fathom why Congress would have authorized such a drastic remedy for private parties in Section 1964(a) of RICO. In fact, Congress's express provision of the dissolution remedy in Section 1964(a) goes far toward confirming that private parties are not entitled to invoke the equitable jurisdiction conferred by that subsection.[35]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

---

[35]Unlike federal prosecutors, private plaintiffs are not responsible for acting in the public interest or ultimately accountable to the electorate. See *Northern Securities*, 194 U.S.at 71 (exclusive government authority to seek permanent injunctive relief under Sherman Act ensures that this extraordinary remedy will be deployed "according to some uniform plan, operative throughout the entire country"). In the hands of private plaintiffs, the far-reaching equitable remedies available under RICO (including corporate dissolution) could have a devastating effect on individual, business, and organizational defendants.

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

JULY 2002

APPENDIX

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, provided in pertinent part:

§ 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce –

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the pay-

ment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The Proposed Model Penal Code of the State of New York (1865), provided in pertinent part:

§ 613. "Extortion" defined. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

The New York Penal Law of 1909 provided in pertinent part:

§ 530. Coercing another person a misdemeanor

A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his

property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

* * * * *

§ 850. Extortion defined.

Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

§ 851. What threats may constitute extortion.

Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or

2. To accuse him, or any relative of his or any member of his family, of any crime; or

3. To expose, or impute to him, or any of them, any deformity or disgrace; or

4. To expose any secret affecting him or any of them.

§ 852. Punishment of extortion.

A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding fifteen years.

§ 853. Compulsion to execute instrument.

The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property within the last two sections.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to

establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Sherman Act of 1890 (Law of July 2, 1890, ch. 647, 26 Stat. 209), provided in pertinent part:

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [current version at 15 U.S.C. § 4]

* * * * *

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of

anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. [repealed 1955]

The Clayton Act of 1914 (ch. 323, 38 Stat. 730), provides in pertinent part:

§ 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [current version at 15 U.S.C. § 15(a)]

* * * * *

§ 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. * * * [current version at 15 U.S.C. § 25]

§ 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * * . [current version at 15 U.S.C. § 26]

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(10) (13)

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*, *Respondents.*

OPERATION RESCUE, *Petitioner,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*, *Respondents.*

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER OPERATION RESCUE

WALTER M. WEBER
LARRY L. CRAIN
DAVID A. CORTMAN
ROBERT W. ASH
AMERICAN CENTER FOR LAW & JUSTICE
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

THOMAS P. MONAGHAN
CHARLES E. RICE
CENTER FOR LAW AND JUSTICE INTERNATIONAL
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

JAY ALAN SEKULOW
Counsel of Record
COLBY M. MAY
STUART J. ROTH
JAMES M. HENDERSON, SR.
VINCENT P. MCCARTHY
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for Operation Rescue, Petitioner in No. 01-1119

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" -- and which defines "extortion" as "the *obtaining of property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)) -- criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

PARTIES

In addition to petitioner Operation Rescue,[1] the following parties were defendants-appellants in the Seventh Circuit and are petitioners here:

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

Respondent National Organization for Women, Inc. (NOW), plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." OR Pet. App. 269a. In addition, there are two other named respondents, the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

ABBREVIATIONS KEY xiv

DECISIONS BELOW 1

JURISDICTION 1

STATUTES 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF 8

A. RICO's Statutory Text 9

1. Expressio unius 9

2. The antitrust parallel 11

B. RICO's Legislative History 15

1. Selection of treble damages remedy 15

2. Rejection of private injunctive remedy 16

C. The Counterarguments 18

1. The word "and" 20

2. Subsection (a) as creating remedies 22

3. "Liberal construction" 23

II. THE HOBBS ACT PREDICATES WERE DEFECTIVE. 24

A. Distortion of Hobbs Act Extortion 28

1. Missing elements of Hobbs Act extortion 29

a. No "obtaining" 29

i. Plain meaning of "obtaining" 33

ii. Meaning of "obtaining" under New York extortion law 33

iii. "Obtaining" at common law: extortion vs. coercion 35

(a) Extortion at common law 36

(b) Statutory distinction between extortion and coercion 37

b. No "property" 39

c. No "consent" 42

d. No "force, violence, or fear" 43

e. No "wrongful" purpose 44

2. Rules of statutory construction 46

a. Avoiding constitutional difficulties 46

b. Federalism 47

c. Rule of lenity 49

B. Impact of Hobbs Act Error on Disposition of Case . 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 13, 14, 15, 17

Beck v. Prupis, 529 U.S. 494 (2000) 14

Bouie v. City of Columbia, 378 U.S. 347 (1964) 47

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 45, 46

California v. American Stores Co., 495 U.S. 271 (1990) 12

Cantwell v. Connecticut, 310 U.S. 296 (1940) 46

Carpenter v. United States, 484 U.S. 19 (1987) 41

Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528 (W.D. Pa. 1984) 19

Cleveland v. United States, 531 U.S. 12 (2000) ... 40, 41, 42

Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123 (D.N.J. 1989) 19

DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984) 9, 21

Evans v. United States, 504 U.S. 255 (1992) .. 31, 33, 35, 36

First Nat'l Bank and Trust Co. v. Hollingsworth, 701 F. Supp. 701 (W.D. Ark. 1988) 19

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 9, 15, 23

Gregory v. Ashcroft, 501 U.S. 452 (1991) 47

Holmes v. SIPC, 503 U.S. 258 (1992) 13, 18

Holmes Group Inc. v. Vornado Air Circulation Sys., Inc., 122 S. Ct. 1889 (2002) 23, 47

Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) 27

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 11

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 9, 21

Klehr v. A.O. Smith Harvestore Products, Inc., 521 U.S. 179 (1997) 14

McCormick v. United States, 500 U.S. 257 (1991) ... 43, 49

McNally v. United States, 483 U.S. 350 (1987) ... 40, 41, 49

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 11

Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) 11, 12, 21, 22

Morissette v. United States, 342 U.S. 246 (1952) 36

Motorola Credit Corp. v. Uzan, No. 02 Civ. 666, 2002 U.S. Dist. LEXIS 9118 (S.D.N.Y. May 21, 2002) 19

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 32, 46

National Organization for Women v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991) 1

National Organization for Women v. Scheidler,
968 F.2d 612 (7th Cir. 1992) 1

National Organization for Women v. Scheidler,
508 U.S. 971 (1993) 1

National Organization for Women v. Scheidler,
510 U.S. 249 (1994) 1

National Organization for Women v. Scheidler,
897 F. Supp. 1047 (N.D. Ill. 1995) 1, 5, 19, 26

National Organization for Women v. Scheidler,
172 F.R.D. 351 (N.D. Ill. 1997) 1

National Organization for Women v. Scheidler,
267 F.3d 687 (7th Cir. 2001) ..... 1, *passim*

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of
R.R. Passengers, 414 U.S. 453 (1974) 11

New York v. United States, 505 U.S. 144 (1992) 47

Northeast Women's Center Inc. v. McMonagle,
868 F.2d 1342 (3d Cir.), *cert. denied*,
493 U.S. 901 (1989) 28, 38, 39

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971) 46

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 11, 21

People v. Ryan, 232 N.Y. 234, 133 N.E. 572 (1921) 34

People v. Squillante, 18 Misc. 2d 561,
185 N.Y.S.2d 357 (Sup. Ct. 1959) 34

People v. Whaley, 6 Cow. 661 (N.Y. 1827) 34

P.R.F., Inc. v. Philips Credit Corp., No. CIV 92-2266CCC.
1992 WL 385170 (D.P.R. Dec. 21, 1992) 19

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986),
cert. denied, 479 U.S. 1103 (1987) ..... 8, *passim*

Reves v. Ernst & Young, 507 U.S. 170 (1993) 18, 23

Rotella v. Wood, 528 U.S. 549 (2000) 14

Russello v. United States, 464 U.S. 16 (1983) 10. 18, 33

Rust v. Sullivan, 500 U.S. 173 (1991) 46

Sedima, S.P.R.L. v. Imrex, 741 F.2d 482
(2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) 9, 17, 21

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 13, 14, 15, 16, 17

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1990) 23

Stephens Group, Inc. v. Voices for Animals, No.
00:5518 (JEI) (D.N.J. First Amended and
Supplemental Complaint filed Apr. 17, 2001) 27

Taylor v. United States, 495 U.S. 575 (1990) 35, 50

Thornhill v. Alabama, 310 U.S. 88 (1940) 46

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) ... 22

Town of West Hartford v. Operation Rescue,
915 F.2d 92 (2d Cir. 1990) 43

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 11

United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) 38, 39

United States v. Bass, 404 U.S. 336 (1971) 44, 48

United States v. Caldes, 457 F.2d 74 (9th Cir. 1972) 44

United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) 38

United States v. Culbert, 435 U.S. 371 (1978) 43

United States v. Delano, 55 F.3d 720 (2d Cir. 1995) 35

United States v. Enmons, 410 U.S. 396 (1973) .. 30, *passim*

United States v. Green, 350 U.S. 415 (1956) 39

United States v. Kozminski, 487 U.S. 931 (1988) 49

United States v. Nardello, 393 U.S. 286 (1969) 38, 49

United States v. Nedley, 255 F.2d 350 (3d Cir. 1958) 34, 39

United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114 (E.D.N.Y. 1992) 38

United States v. Starks, 515 F.2d 112 (3d Cir. 1975) 38

United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) 48

United States v. Sweeney, 262 F.2d 272 (3d Cir. 1959) .. 39

United States v. Turkette, 452 U.S. 576 (1981) 33

Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951 (D. Del. 1986) 19

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I. 46

U.S. Const. amend. V. 46. 47

10 U.S.C. § 921 30

11 U.S.C. § 727 30

15 U.S.C. § 15 ..... 12, 13, 21

15 U.S.C. § 26 ..... 12. 21

15 U.S.C. § 1703 30

18 U.S.C. § 248 48

18 U.S.C. § 1341 30

18 U.S.C. § 1343 30

18 U.S.C. § 1951 ..... i, *passim*

18 U.S.C. § 1952 ..... 4, 6, 25

18 U.S.C. § 1961 ..... 1, 25

18 U.S.C. § 1962 25

18 U.S.C. § 1964 ..... i, *passim*

28 U.S.C. § 1254(l) 1

Fed R. Civ. P. 50 26

Fed. R. Civ. P. 60(b) 3

OTHER AUTHORITIES

31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 40, 49-50 (1989) 35

4 W. Blackstone, *Commentaries* 36

Black's Law Dictionary (5th ed. 1979) 33

Blakey & Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability (Under RICO)*, 33 Am. Crim. L. Rev. 1345 (1996) 38

3 E. Coke, *First Institute* (J. Thomas ed. 1826) 36

91 Cong. Rec. 11,912 (1945) 43

115 Cong. Rec. 6,992-96 (1969) 16

116 Cong. Rec. 27,738-39 (1970) 16

116 Cong. Rec. 35,227-28 (1970) 17

116 Cong. Rec. 35,346-47 (1970) 17

117 Cong. Rec. 46,386, 46,393 (1971) 17

118 Cong. Rec. 29,368, 29,370 (1972) 18

119 Cong. Rec. 10,317-19 (1973) 18

Field Code §§ 584, 613 (1865) 34

"Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) 27

"Furriers file a RICO suit over animal rights projects," The Star-Ledger, Aug. 6, 1999 28

H.R. 19215, §§ 584, 91st Cong., 2d Sess. (1970) 16

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* U.S.C.C.A.N. 4007, 4034 16

W. Hawkins, *A Treatise of the Pleas of the Crown* (6th ed. 1788) 37

Lindgren, *The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988) 36, 37

Model Penal Code (1980) 37

Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691 (1999) 25, 29, 33

Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (1998) 27

Oxford English Dictionary, vol. 10 (2d ed. 1989) 33

Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1970-1971) 17

ABBREVIATIONS KEY

App.	Appendix
JA	Joint Appendix
Opp.	Brief in Opposition
OR	Petitioner Operation Rescue (No. 01-1119)
PA	Plaintiffs' Appendix in the Seventh Circuit
Pet.	Petition for Writ of Certiorari
RA	Appendix to OR's Reply to Brief in Opposition (No. 01-1119)
Resp.	Response in Support of Petition for Writ of Certiorari (No. 01-1118)
Sch.	Petitioners Joseph Scheidler, *et al.* (No. 01-1118)
Tr.	Transcript of trial

DECISIONS BELOW

All pertinent decisions in this case to date are entitled *National Organization for Women v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 937 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's previous partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision below, affirming judgment for respondents, appears at 267 F.3d 687 (7th Cir. 2001).

JURISDICTION

The U.S. Court of Appeals rendered its panel decision on October 2, 2001, and denied timely petitions for rehearing and rehearing en banc on October 29, 2001. Petitioners filed timely petitions for certiorari on January 28, 2002. This Court granted certiorari on April 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

The Appendix to OR's Petition for Certiorari contains the text of the Hobbs Act, 18 U.S.C. § 1951 (App. N), and excerpts of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961, 1964 (App. O).

STATEMENT OF THE CASE

This is a civil RICO case. Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they

were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The petitioners, including Operation Rescue (OR), are pro-life activist organizations and individuals.

It is undisputed that petitioners all share the goal of stopping abortion, and that this is a lawful goal, *e.g.*, Tr. 4315. It is likewise undisputed that petitioners, on their own and through the alleged RICO enterprise, engaged in a variety of constitutionally protected expressive activities. *E.g.*, Tr. 4291, 4293. The anti-abortion efforts at issue included extensive free speech activity, such as leafletting, writing, singing, praying, and other pure speech, pickets, sidewalk counseling, etc. *See* OR Pet. App. 17a ("All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities").

Defendants explicitly embraced nonviolence for their efforts; indeed, OR went so far as to require a pledge of nonviolence for participants. *See, e.g.*, Tr. 1332, 1357-59, 2468, 2470; PA120, PA168, PA219. *See also* Tr. 982, 1263, 1265, 1271, 1815, 1971, 2262-63, 2378-79 (embrace of nonviolence).[2] The

[2]NOW sought to paint pro-life activists as extreme and violent by relying on isolated quotations taken out of context. For example, NOW cited the "Green Beret" image, suggesting militarism, yet the pertinent document gave as examples of "Green Berets" not just a "rescuer" willing to go to jail, but also someone who works "full-time with little or no pay for four months in the election of a pro-life candidate." PA100. NOW quoted Scheidler as urging pro-lifers to "take their fight against abortion to the doors of abortion clinics," but the letter to the editor in question refers to one-on-one sidewalk counseling outside abortion businesses, PA130. NOW quoted Scheidler using the phrase "pro-life mafia," but in context the term referred wryly to activism, not violence, PA182. *See also* PA122 (using term "aggressive tactics" to mean sit-ins and demonstrations).

NOW accused defendants of giving "special, private meanings" to the word "violence." Yet it was NOW's witnesses who defined "violence" to

(continued...)

nationwide activities at issue spanned some fourteen years. OR Pet. App. 285a, but the jury found only four acts or threats of violence, against either persons or property, by unnamed persons associated with the alleged enterprise. JA 144 (#4(e)).

NOW sought to impose liability upon petitioners for any act, no matter how isolated, that anyone participating in a pro-life demonstration supposedly committed.[3] *E.g.*, Tr. 2228, 2231 (quoted in OR Pet. at 27-28); OR Reply at 2-3 & n.4. Over petitioners' objection, Tr. 4495-98,[4] the district court did not require the jury to identify any particular alleged incidents of wrongdoing.[5] Instead, the district court approved a verdict form that allowed the jury to impose liability for unspecified acts by "any other person associated with PLAN [Pro-Life Action Network, the alleged RICO enterprise]," JA 143 (#4) (predicate acts). *See also* JA 145 (#7) (RICO pattern may be based on acts of "persons associated with PLAN"); *id.* (#9) (proximate cause may rest on acts of "any person associated with PLAN"). The jury then found some two dozen unidentified predicate acts to have been committed by unspecified persons "associated with PLAN," that at least two of those acts proximately caused injury to the respondents, and that respondents Summit and DWHO

[2](...continued)
include virtually all pro-life activism. *See, e.g.*, Tr. 730 (Susan Hill) ("every rescue event that has been conducted in this country in the last 15 years by Operation Rescue" has "felt violent to us"); Tr. 1268 (Maureen Burke) ("every act of civil disobedience that would block access to an abortion clinic" is violent, even if "entirely passive, peaceful, nonresistant, silent"), 1278 (Burke) (sidewalk counseling, yelling, raising voice all violent).

[3]Petitioners demonstrated in detail in their joint Rule 60(b) motion (which the district court denied for other reasons) that at least some of the alleged incidents of misconduct were fabricated or unconnected to petitioners.

[4]The district court repeatedly admonished that an objection by any defendant would be deemed made on behalf of all. Tr. 475, 689, 5181.

[5]Thus, as the district court conceded, OR Pet. App. 254a, there is no way to know exactly what the jury found to qualify as extortionate predicates.

had suffered monetary damages from their RICO injuries. JA 143-46 (#4, 9, 10).[6] (No other party was awarded damages.)

As RICO predicates, NOW alleged "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951, "extortion" under state law, and "extortion" under the federal Travel Act, 18 U.S.C. § 1952. NOW's theory of the case was that any physical obstruction of abortion -- e.g., by a sit-in -- was extortion against women and abortion businesses, and thus a predicate act of racketeering under RICO. *See, e.g.*, Tr. 4327; *id.* at 5003-09.[7] Petitioners were not alleged to have obtained any tangible property, Tr. 4327 -- or any intangible property like trademarks or stocks -- but only to have interfered with the rights of women and the business of abortion. *E.g.*, Tr. 4987 (respondents' closing argument) ("Property rights include a woman's right to choose what to do when faced with an unplanned pregnancy. Our most precious rights are the intangible ones . . ."). The district court adopted NOW's view of extortion. *E.g.*, OR Pet. App. 109a-111a, 195a-196a.

Under the district court's instruction, the jury was not required to find anything more than nonviolent sit-ins to find defendants liable for "extortion."[8] Tr. 4944-47. In closing

[6]The damages consisted exclusively of "extraordinary security costs." Tr. 2003-04.

[7]*E.g.*, Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

[8]While the jury found 25 acts or threats of "extortion," *infra* note 9, the jury found only four acts or threats of violence, JA 144 (#4(e)). Hence, the jury necessarily found that at least 21 -- and possibly all 25, *see infra* note 10 -- of the acts of "extortion" (sit-ins) were nonviolent.

One question on the jury verdict form asked whether the jury's findings of predicate extortion under the Hobbs Act or state law were "based solely

(continued...)

arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]." Tr. 5005, arguing that each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[9] JA 143-44.[10]

After the jury found liability and damages under RICO, the district court imposed treble damages, granted a permanent injunction,[11] and entered judgment for NOW. OR Pet. App.

[8](...continued)
on blockades of clinic doors or sit-ins within clinics, without more." JA 145 (#6). In closing arguments to the jury, NOW argued that the phrase "without more" meant that the sit-ins "didn't keep anybody out." Tr. 4987. In other words, unless the sit-in participants always moved aside to let people "freely walk in," NOW argued, the jury must answer the question "no." Tr. 4987-88. *See also* TR. 5008 (quoted in OR Reply App. at 27). Consequently, this question became the meaningless one, "If you found extortion, was it based solely on a blockade or sit-in where participants stepped aside for anyone coming or going?" The jury's negative answer to this question thus did not indicate a finding that sit-ins were violent.

[9]The jury was instructed to treat each intentional sit-in at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48 (quoted in Sch. Pet. App. 150a-152a). Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for federal or state "extortion," 23 each for Travel Act violations). JA 143-44. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47 (Sch. Pet. App. 150a-152a), with the difference that the federal version had an interstate commerce element, JA 136-37. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). JA 143-44. Thus, a single sit-in would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

[10]NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. JA 144 (#4(e)).

[11]The district court rejected petitioners' contention that RICO does not authorize private parties to sue for injunctive relief. OR Pet. App. 131a-

(continued...)

260a-274a & n.10. 277a-282a.

On appeal, petitioners disputed the availability of private injunctive relief under RICO and contested the district court's failure to require NOW to plead or prove the required elements of predicate extortion. Petitioners specifically challenged NOW's failure to plead or prove the elements of "obtaining property," by "wrongful use of actual or threatened force, violence, or fear," and with the "consent" of the alleged victims.

The Seventh Circuit affirmed. The court of appeals held that private parties could sue for injunctive relief under RICO, OR Pet. App. 7a-17a, and that the Hobbs Act did apply to the conduct of petitioners or others associated with PLAN, *id.* at 35a-36a. In particular, the court of appeals held that, to satisfy the element of "obtaining property" under the Hobbs Act, a "loss to, or interference with the rights of, the victim is all that is required." *Id.* at 36a.[12]

SUMMARY OF ARGUMENT

The court of appeals erred both in reading RICO to authorize private injunctive relief and in reading the extortion section of the Hobbs Act to apply to the protest activities in this case.

The text and history of RICO's civil remedies provision clearly demonstrate that private parties are not entitled to sue for injunctive relief under RICO. The remedies section -- 18 U.S.C. §1964 -- confers unqualified authority on the federal government to "institute proceedings" under RICO, but gives private litigants only a right to sue for treble damages. RICO's

[11](...continued)
134a. 261a.

[12]The court of appeals believed -- erroneously, *see* OR Pet. at 5, 9 n.15, 23 -- that its affirmance of the Hobbs Act predicates sufficed to sustain the RICO judgment. OR Pet. App. 36a-37a. Accordingly, the court of appeals did not reach petitioners' challenges to predicate extortion under state law or the Travel Act. *Id.* at 36a-38a.

treble damages provision is borrowed from indistinguishable language in the federal Sherman and Clayton antitrust statutes, language which this Court had already held does *not* authorize private injunctive relief. While Congress adopted a separate provision in the Clayton Act conferring injunctive remedies on private litigants, Congress adopted no such provision for RICO. On the contrary, the statutory history of RICO shows the repeated failure of efforts to add precisely such a private injunctive remedy. Hence, the injunction in this case -- which rests exclusively on RICO -- must be reversed.

The lower court's theory of Hobbs Act extortion is also flawed. Extortion under the Hobbs Act requires "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Yet the court below read the Hobbs Act as criminalizing (and thus making RICO predicates of) mere interference with rights, as by the protest sit-ins in this case. Such a misreading of Hobbs Act extortion would make a racketeer out of Martin Luther King, Jr., temperance crusaders, abolitionists, and environmental or animal rights protesters, a result which itself suggests the implausibility of the lower court's ruling. The text of the Hobbs Act supports no such reading of extortion. As demonstrated by recourse to the plain meaning of the text, confirmed by the historical roots of that text, extortion requires the *acquisition of property*, not mere damage to or interference with intangible rights.

Moreover, the claim that a nonviolent protest sit-in qualifies as extortion -- the theory supporting the judgment below -- ignores the required elements of "consent," "wrongfulness," and "force, violence, or fear," all of which are lacking here. Accordingly, the judgment must be reversed.

ARGUMENT

This case raises the questions of the availability of private injunctive relief under civil RICO and the scope of Hobbs Act extortion, a predicate offense under RICO. The Seventh Circuit erred both in holding private injunctive relief to be available under RICO and in holding that Hobbs Act extortion was properly pled and proved in this case. The judgment of the Seventh Circuit is wrong and must be reversed.

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

RICO does not authorize injunctive relief in civil suits brought by private parties. In RICO, Congress employed language taken almost word-for-word from antitrust law, language which this Court had already held *not* to authorize private injunctive relief. Congress eschewed other language, in antitrust law, expressly conferring private injunctive remedies. The exclusion of private injunctive relief from civil RICO could scarcely be clearer.

The decision below is aberrant and erroneous. The virtually unanimous conclusion of the lower courts analyzing the issue -- that RICO does not authorize injunctive relief for private parties -- is clearly correct.[13]

---

[13]Many lower federal courts have addressed this question. In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollersheim*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). Moreover, virtually no court since *Wollersheim* -- other than in this case -- has held that private parties can obtain injunctive relief under RICO. Even prior to (continued...)

A. RICO's Statutory Text

1. Expressio unius

The remedies provision of RICO (18 U.S.C. § 1964), OR Pet. App. 308a-309a,[14] contains three subsections addressing civil relief. None gives injunctive relief to private parties.

Subsection (a) confers jurisdiction upon the district courts and authorizes broad equitable remedies. This provision, however, does not empower private litigants to seek the injunctive relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This unqualified authorization to "institute proceedings" plainly authorizes the federal government to pursue the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains . . . ." Unlike subsection (b), there is no blanket authorization to "institute proceedings"; instead, using distinct language, the provision specifies a right

---

[13](...continued)
Wollersheim, only one district court so held. *See infra* note 19. Every other court to address the issue (except in this case and one other district court case, *see infra* note 19) has either rejected private equitable relief under RICO, expressed serious doubts about such relief, or declined to decide the question. *See* OR Pet. at 11-12 & nn.16-19. (For an especially thorough analysis of the issue, *see Wollersheim*; *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984).)

[14]The version set forth in OR's Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

to sue and a remedy, namely, treble damages. This Court's observation in *Russello v. United States*, 464 U.S. 16 (1983), therefore applies here:

> Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Id. at 23 (internal quotation and editing marks omitted). Had Congress intended to confer on private parties an unqualified right to "institute proceedings," then -- in the words of *Russello* -- "it presumably would have done so expressly as it did in the immediately [preceding] subsection," *id.*

Subsections (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," OR Pet. App. 10a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). On the contrary, as in *Russello*, this Court should

> refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

464 U.S. at 23. Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for all the other equitable relief available to the Attorney General, including dissolution of enterprises. *See* § 1964(a).

The statutory text of RICO therefore plainly indicates that Congress did *not* authorize private injunctive relief:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). This rule makes perfect sense: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

2. The antitrust parallel

The conclusion that private parties cannot obtain injunctive relief under RICO is confirmed beyond all doubt by reference to the antitrust model from which Congress borrowed the remedial provisions of RICO. Congress borrowed, for RICO, precisely the remedial language this Court had held *not* to authorize private injunctive relief, and *declined* to borrow a separate provision of antitrust law expressly conferring private injunctive remedies.

This Court construed the statutory language in question, in the Sherman antitrust statute, *not* to authorize private injunctive relief. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief). *Accord Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). The parallels to RICO are striking. Section 7 of the Sherman antitrust statute provided:

> "Any person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

194 U.S. at 68 (quoting statute) (*see* RA at 1). The language of RICO § 1964(c) is virtually word-for-word the same.

Like RICO § 1964, the Anti-Trust Act construed in *Northern Securities* contained a subsection conferring on federal courts "jurisdiction to prevent and restrain violations of this act" (Section 4), *see* 194 U.S. at 67. (*See* RA at 1.) The existence of a similar grant of equity jurisdiction in RICO § 1964(a) (OR Pet. App. 308a) only bolsters the statutory parallel.

After *Northern Securities*, Congress in 1914 enacted the Clayton Antitrust Act. That statute contains the following treble damages language:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

15 U.S.C. § 15(a). This provision is borrowed straight from Section 7 of the Sherman Act -- i.e., the provision held *not* to authorize private injunctive relief. In addition to the treble damages provision, Congress *added* a *separate* provision authorizing private parties to sue for injunctions:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . .

15 U.S.C. § 26. *See California v. American Stores Co.*, 495 U.S. 271, 287 (1990) (provision "filled a gap in the Sherman

Act by authorizing equitable relief in private actions"). This express conferral of private injunctive remedies has no parallel in RICO.

In sum, when enacting RICO § 1964, Congress borrowed the treble damages language of the Sherman and Clayton Acts, but did *not* borrow the private injunctive remedy language of the Clayton Act. The conclusion is inescapable: RICO does not authorize private injunctive relief.

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4 [15 U.S.C. § 15]. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).[15]

* * *

[15]The Seventh Circuit declared that because this Court "regularly treats the remedial sections of RICO and the Clayton Act identically," OR Pet. App. 16a, RICO should be read as authorizing private injunctive relief "regardless of superficial differences in language." *id.* To state this argument is to refute it.

This Court appears already to have acknowledged that private injunctive relief is not available under RICO. This Court has consistently described RICO § 1964(c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A.O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The text of RICO confirms this Court's consistent understanding of civil RICO.

In its Brief in Opposition, NOW conceded that § 1964(c), the private remedies provision of RICO, does not authorize injunctive relief. Opp. at 9 ("RICO's *only* source of permanent injunctions is § 1964(a)") (emphasis added). NOW therefore hangs its entire case for injunctive relief on § 1964(a). This Court has already noted, however, that § 1964(a) is part of remedial provisions "limited to injunctive actions by the United States," *Sedima*, 473 U.S. at 486-87 (1985). Despite *Sedima*, NOW argues that because § 1964(a) does not *expressly exclude* private parties, it must be read to *include* them. Opp. at 9-10. This is illogical. Section 1964(a) does not, by its terms, authorize *any* party to bring a civil RICO action, including the federal government. The United States can sue for injunctive relief under RICO only because a separate subsection -- § 1964(b) -- gives the Attorney General authority to "institute proceedings under this section." By contrast, the private treble-damages provision, § 1964(c) -- the only subsection to authorize private relief -- contains no blanket authorization for private parties to "institute proceedings." That subsection only entitles persons injured in their business or property to "sue therefor . . . and recover threefold the damages," § 1964(c).

This subsection does not reference § 1964(a) or even "this section," but instead, as this Court has always understood, provides a distinct private damages remedy.

B. RICO's Legislative History

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO.

1. Selection of treble damages remedy

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute, and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The

selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

2. Rejection of private injunctive remedy

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly from the rejection by Congress of proposals to authorize private injunctive relief:

> [I]n considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong., 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by

private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job." *id.* In particular, Rep. Steiger bemoaned the fact that "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House, Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").[16]

---

[16]Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155. *See also Sedima*, 741 F.2d at 489 n.20; 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement

(continued...)

In sum, Congress repeatedly declined to authorize private injunctive relief under RICO. *See Russello*, 464 U.S. at 23-24 (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").[17]

C. The Counterarguments

In light of the foregoing, it is not surprising that virtually every court to address the issue has concluded that RICO does not authorize private parties to sue for injunctive relief. *See supra* note 13. Indeed, lower courts have frequently declared themselves *compelled* to reach this conclusion.[18]

---

[16](...continued)
of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations . . . . Now only the United States can institute injunctive proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sen. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

[17]The Seventh Circuit disparaged recourse to the legislative history of RICO. OR Pet. App. 14a-15a. But this Court has repeatedly invoked legislative history as a basis for limiting RICO. *E.g.*, *Holmes v. SIPC*, 503 U.S. 258, 267-68 (1992); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993). In fact, as illustrated in the text *supra*, analysis of legislative history is characteristic of this Court's RICO jurisprudence.

[18]*See, e.g.*, *Wollersheim*, 796 F.2d at 1088 ("Taken together, the (continued...)

Only two district courts (aside from the courts below here) have held to the contrary.[19] One case preceded the extensive analysis in *Wollersheim* and has not been followed by any other court.[20] The other, while distancing itself from the Seventh Circuit's reasoning in this case, erroneously relied upon a presumed power of courts, *apart from RICO*, to grant equitable relief.[21] The district court [22] and court of appeals in the present case, meanwhile, offered no convincing analysis. Furthermore,

---

[18](...continued)
legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO") (footnote omitted); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703 (W.D. Ark. 1988) ("it would be difficult, if not impossible, to draw a different conclusion"); *P.R.F., Inc. v. Philips Credit Corp.*, No. CIV 92-2266CCC, 1992 WL 385170 at *3 (D.P.R. Dec. 21, 1992) ("any other conclusion would not be reasonable").

[19]*See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666, 2002 U.S. Dist. LEXIS 9118 (S.D.N.Y. May 21, 2002).

[20]Indeed, even later district court decisions in the same federal circuit (the Third) as the *Chambers* court, *supra* note 19, reached the opposite conclusion from *Chambers*, ruling that RICO does not provide for injunctive relief to private parties. *See Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989).

[21]*Motorola Credit*, 2002 U.S. Dist. LEXIS 9118 at *6-*10. In effect, the *Motorola* court placed the burden on Congress explicitly to *deny* private injunctive relief to private parties, rather than following the rule that where Congress specifies certain remedies, they are normally deemed exclusive. *See supra* § I(A)(1).

[22]The district court provided virtually no analysis of the issue. *See* OR Pet. App. 131a-134a, 260a-262a. That court said that there was "substantial authority" for its position among the lower courts and declared itself "persuaded by the rationale in those opinions." *Id.* at 134a. But none of the cases the district court cited held that private parties can sue for injunctive relief under RICO. Indeed, several of the decisions the district court relied upon did not even involve RICO.

none of the arguments offered for reading into RICO a private injunctive remedy has merit.

1. The word "and"

It has been argued that the word "and" in RICO § 1964(c) provides a justification for private injunctive relief. The contention is that, because subsection (c) provides that any person injured in his business or property may sue "*and* shall recover" treble damages, instead of providing that any such person may sue "*to* recover" treble damages, that therefore the relief under subsection (c) is not limited to treble damages.

The Seventh Circuit embraced essentially this argument in support of its holding. The court read the word "and" as severing the first clause of subsection (c) from the remainder of that subsection. In effect, the Seventh Circuit read subsection (c) as if it were written as follows:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court ~~and~~[. In addition to any other available remedies, such person] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

See OR Pet. App. 10a. This "reconstruction" of RICO § 1964(c) is simply another version of the argument that the word "and," rather than linking the private cause of action with the treble damages remedy, instead justifies construing subsection (c) as a blanket authorization for private parties to institute civil RICO suits for both treble damages and all equitable relief identified in subsection (a).

This argument is deeply flawed.

First, this reading is "bizarre and wholly unconvincing as a matter of plain English and the normal use of language."[23] If Congress had intended to take such a significant step as authorizing private RICO suits for injunctive relief -- and the text and legislative history, discussed above, decidedly refute any such intent -- it would be truly "bizarre" for Congress to do so by such an obscure and indirect means when Congress could simply have said so in plain language.

Second, the identical term "and" appears, in an indistinguishable context, in the Sherman antitrust statute, *see supra* § I(A)(2), which this Court held does *not* authorize private suits for injunctive relief, *see Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917); *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 67-68, 70-71 (1904). Moreover, the private treble damages provision of the Clayton antitrust act, 15 U.S.C. § 15, uses the term "and" in identical fashion. To read this word as implying that private litigants may also sue for injunctive relief would render the Clayton Act's separate, express authorization of private injunctive relief, 15 U.S.C. § 26, a meaningless redundancy.[24]

Third, the term "and," if anything, operates to *limit* the available relief to that explicitly set forth in RICO § 1964(c). Had that subsection merely authorized anyone injured in his business or property "to sue therefor," *period*, then there might be some ambiguity as to what relief would be available. But by spelling out that an injured person may sue "and recover threefold the damages he sustains," the statute leaves no doubt as to both the right and the remedy.

In short, the word "and" simply cannot bear the weight this argument places upon it.

---

[23] *Kaushal*, 556 F. Supp. at 582. *Accord Sedima*, 741 F.2d at 489 n.20.

[24] *See Wollersheim*, 796 F.2d at 1087 & n.11; *Kaushal*, 556 F. Supp. at 583 & n.22; *Sedima*, 741 F.2d at 489 n.20; *DeMent*, 589 F. Supp. at 1382.

2. Subsection (a) as creating remedies

The argument has also been made that subsection 1964(a), which confers jurisdiction and authorizes certain remedies, should be read as creating remedies under RICO for both private parties and for the government. Under this reading, subsection (b) merely gives the government an *additional* right to equitable relief *pendente lite*, and subsection (c) merely gives private parties an *additional* right to treble damages, costs, and attorney fees. The Seventh Circuit appears to have embraced this argument. OR Pet. App. 9a-10a.

This argument is defective.

First, this argument ignores the explicitly *jurisdictional* nature of subsection (a) ("The district courts . . . shall have jurisdiction to . . ."). *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-77 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . ., not in the jurisdictional provision"). While subsection (a) authorizes equitable relief, it does *not* -- as the Seventh Circuit conceded, OR Pet. App. 12a -- specify which plaintiffs can seek the remedies it provides. For the answer to that question, recourse must be had to subsection (b) ("The Attorney General may institute proceedings under this section."). Thus, the subsection (a) argument depends entirely upon the premise that subsection (c) grants private plaintiffs -- and not just the Attorney General -- *plenary* authority to "institute proceedings under this section," an argument refuted above. *Supra* §§ I(A)(1), (C)(1).

Second, this argument again ignores the parallels to antitrust law. The very statute which this Court held did *not* authorize private injunctive relief, *supra* § I(A)(2), also contained a broad jurisdictional provision with language largely identical to subsection 1964(a). *See Northern Securities*, 194 U.S. at 67

(quoting text of § 4).

The Seventh Circuit perceived (OR Pet. App. 11a) support for its reasoning in this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990). But reliance on *Steel Co.* is puzzling. That case merely rejected the claim that a provision giving courts "jurisdiction in actions brought under [a subsection]" made every element of the pertinent substantive subsection "jurisdictional." *Id.* Petitioners made no such argument regarding RICO.

3. "Liberal construction"

Another argument the Seventh Circuit offered to justify reading into RICO a right of private injunctive relief is the legislative directive to construe RICO liberally to effectuate its purposes. OR Pet. App. 12a-13a. This argument is a make-weight.[25] As this Court has explained, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The meaning of RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.[26]

---

[25]The Seventh Circuit's invocation of the broad "underlying purposes" of RICO, OR Pet. App. 13a, is likewise no warrant for construing RICO contrary to its text and legislative history. "Our task here is not to determine what would further Congress's goal . . . but to determine what the words of the statute must fairly be understood to mean." *Holmes Group Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1895 (2002).

[26]As the Fifth Circuit observed:

> The "liberal construction" directive, however, neither compels nor authorizes us to disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at doing so.

Fredeman, 843 F.2d at 830.

* * *

By in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private parties are no longer limited to damages for the harm they suffered; they now can seek equitable relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Under the Seventh Circuit's faulty interpretation, the RICO injunctive weapon can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

This Court should reverse the Seventh Circuit and hold that RICO does not authorize private injunctive relief.[27]

II. THE HOBBS ACT PREDICATES WERE DEFECTIVE.

NOW's case, the district court's rulings and jury charge, and the Seventh Circuit's affirmance of the judgment, each proceeded on a fundamentally flawed view of predicate extortion.

RICO requires proof of other, "predicate" offenses. The conduct at issue here does not constitute predicate extortion under the Hobbs Act. Consequently, NOW's civil RICO

[27]Hence, judgment must be entered against those respondents which obtained only injunctive relief, namely, NOW, those members represented by NOW, and all of the plaintiff class members.

judgment resting upon, *inter alia*, Hobbs Act predicates, must be reversed.

Each subsection of RICO requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962(b), (c). A "pattern" of racketeering activity "requires at least two acts of racketeering activity," *id.* § 1961(5). The necessary acts of racketeering must in turn come within RICO's definition of "racketeering activity," *id.* § 1961(1), which lists the specific offenses that qualify as predicate acts for RICO. Thus, a RICO plaintiff must allege and prove at least two "predicate acts" that fall within the RICO definition of "racketeering activity" and form a "pattern."

Not every crime qualifies as a predicate offense supporting a RICO claim. For example, the list of predicate crimes, 18 U.S.C. § 1961(1), does *not* include trespass, disorderly conduct, obstruction of public passages, vandalism, harassment, resisting arrest, contempt of court, assault, battery, or even rioting, *id.* In other words, RICO excludes from its coverage precisely those offenses most likely to arise in the context of political or social protest. This is no coincidence: Congress adopted an enumerated list of predicate offenses in response to concern that RICO, if drafted more generally, could be used as a weapon against protesters who engaged in unlawful demonstration activity. Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999) (documenting evolution of RICO in response to concern over potential application to protesters).

Faced with a statute that does not lend itself to use against protesters, NOW nevertheless sought to shoehorn this case into RICO on the theory that coercive protesting is a form of "extortion." NOW pursued, and went to trial on, the theory that petitioners committed predicate acts of "extortion" under federal law (Hobbs Act, 18 U.S.C. § 1951(a), (b)(2), and Travel Act, 18 U.S.C. § 1952) and the law of the state where the act

was committed. NOW's theory essentially was that any unlawful act which interfered with access to, or the provision of, abortion, made someone "give up" a right and therefore constituted "extortion" under federal and state law. *E.g.*, Tr. 550, 564-67, 4327-28, 4335-37, 4874-75, 4961, 4983-87, 4989, 5003-11, 5016, 5037, 5118. Petitioners objected[28] to NOW's construction of the extortion laws at many points in the case: dismissal motions, summary judgment, Rule 50 motions at the close of NOW's case and at the close of all evidence, the jury instructions, and post-trial motions. The district court at each point rejected petitioners' objections and embraced NOW's theory of extortion. *See* OR Pet. App. 108a-114a (finding Hobbs Act violations sufficiently pled);[29] *id.* at 121a-129a (Travel Act and state extortion sufficiently pled); *id.* at 194a-199a (evidence of interference with abortion suffices to defeat summary judgment on Hobbs Act); Tr. 2462, 4880, 4903 (Rule 50); Tr. 4944-48 (jury charge); OR Pet. App. 275a-276a (post-trial motions). *See also, e.g.*, Tr. 4332, 4339-40, 4884-85. The jury returned a verdict for respondents, finding that over two dozen acts of "extortion" had been committed. OR Pet. App. 311a-312a. *See supra* note 9.

NOW sought to prove that petitioners and others associated with the Pro-Life Action Network did something illegal which interfered with the practice of abortion. The Seventh Circuit equated this with extortion and racketeering. Under this approach, virtually *any unlawful activity designed to change anyone's conduct could be extortion.* This erroneous view of extortion would sweep within its definition any protest activity that crosses the line from legal to illegal activity. Sit-ins at

[28] *See supra* note 4.

[29] The district court stated: "If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss." *Id.* at 110a (footnote omitted).

segregated lunch counters, chaining oneself to a redwood tree scheduled to be cut down, blocking the entrance to an auditorium where a hatemonger is speaking, interference with access to a pornography business -- all of these could be "extortionate" under the decision below. NOW essentially admitted as much. *See* Tr. 4963 (closing argument for respondents) (RICO enterprise "could be an animal rights group that bars entry to a restaurant that serves veal"). The district court likewise recognized that RICO might have been used to wipe out "civil rights actions, demonstrations in the '60s or anti-war demonstrations in the '70s." Tr. 4339-40. *Accord* OR Pet. App. 158a ("The instant case is paradigmatic of RICO's seemingly unlimited applicability").

In short, *any unlawful protest activity* would, under the rationale of the Seventh Circuit, constitute felony extortion. More than one such illegal act could trigger a civil RICO suit, with extortion serving as the predicate.

This is not mere speculation. Civil RICO is already being invoked against protesters of various political stripes. *See, e.g., Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998) (www.house.gov/judiciary/35055.htm) (testimony of Jeffrey S. Kerr, General Counsel, People for the Ethical Treatment of Animals) (civil RICO suit filed against anti-vivisection protesters); *Stephens Group, Inc. v. Voices for Animals*, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) (laboratory and its shareholder adding civil RICO claims against animal rights groups); *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) (civil RICO suit filed against anti-fur protesters); "Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p.

3 (May 1999) (same); "Furriers file a RICO suit over animal rights projects." The Star-Ledger, Aug. 6, 1999 (federal civil RICO suit filed in Newark, New Jersey, against animal rights groups).[30]

Social protest has a long and revered history in this nation. From the burning or hanging of effigies in colonial times, to the temperance activists' disruption of taverns, to the civil rights and anti-war sit-ins of the 1960's and 1970's, demonstrations -- even illegal ones -- have been both an outlet for dissent and an instrument for social and legal change. In totalitarian regimes, demonstrators are crushed by tanks. In this nation, by contrast, protesters may be arrested, fined, or jailed for offenses they commit, but they are not treated like hardcore criminals -- unless the Seventh Circuit's misreading of the Hobbs Act stands.

Happily, a proper reading of RICO and federal (and state) extortion laws requires rejection of the Seventh Circuit's view of predicate extortion.

A. Distortion of Hobbs Act Extortion

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). A claim of Hobbs Act extortion fails if any of these statutory elements

[30]The fact that the cited cases were filed in district courts within the Third Circuit is no coincidence. In *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the Third Circuit became the first federal appeals court to endorse the use of RICO against protesters under a theory of Hobbs Act extortion. The Seventh Circuit's adoption of a similarly distorted view of federal extortion in the present case will, unless corrected by this Court, doubtless produce its own clones.

is lacking. In this case, NOW failed to allege or prove "the obtaining of property," "with his consent," and "wrongful use of actual or threatened force, violence or fear."

1. Missing elements of Hobbs Act extortion

a. No "obtaining"

Violation of the Hobbs Act requires "the *obtaining* of property *from* another . . . ." 18 U.S.C. § 1951(b)(2) (emphasis added). The Seventh Circuit failed to require NOW to prove any such "obtaining" in this case. According to the Seventh Circuit, despite the text of § 1951, an "extortionist" can "violate the Hobbs Act without either seeking or receiving money or anything else," OR Pet. App. 36a. "A loss to, or interference with the rights of, the victim is all that is required." *Id.*[31] Thus, any protest activity that crosses into tortious or illegal behavior (a trespass, an obstruction, an instance of physical contact) would subject the actor to federal criminal felony liability as an "extortionist" under the Hobbs Act and a "racketeer" (if two or more acts are involved) under RICO. A recipe more deadly for social protest could scarcely be imagined.

The Seventh Circuit's decision also creates considerable mischief for government actors. The Hobbs Act proscribes the extortionate "obtaining of property . . . under color of official right." § 1951(b)(2). Under the decision below, this means "[causing a] loss to, or interfer[ing] with the rights of, the victim," OR Pet. App. 36a, under color of official right. Thus, any police misconduct (false arrest, excessive force, etc.) or other act of government officials (e.g., withholding a municipal permit for a pornography business or gun store) that interferes with someone's rights, would become federal criminal extortion

[31]The court below claimed support in "a long line of precedent," *id.*, but the "precedent" is merely lower court dicta. *See generally* Note, *supra* p. 25, at 718-19 & n.124.

and racketeering.

The decision below creates mischief for federal robbery law as well. The "robbery" section of the Hobbs Act also uses the term "obtaining": "robbery" is the "taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . .," 18 U.S.C. § 1951(b)(1). Under the Seventh Circuit's distorted view of "obtaining," a protester who pushes someone to the ground, causing that person's pants to tear or glasses to break, commits "robbery" ("obtaining" the pants or glasses by actual force). The bumping of opposing demonstrators would become the stuff of felony prosecutions and civil RICO suits.[32]

The Seventh Circuit's rewriting of the Hobbs Act does *not* square with the law and is simply wrong. As this Court has clearly held, the "obtaining" of property requires the *acquisition of*, and not mere injury or interference with, property. For example, in *United States v. Enmons*, 410 U.S. 396 (1973), the defendants wrongfully caused property losses and interfered with rights, *id.* at 398 (recounting acts of violence); *id.* at 399 ("wrongful violence" is redundant), yet there was no extortion: the defendants did not wrongfully *obtain property*, *id.* at 399-400. *See id.* at 400 (distinguishing the obtaining of "personal payoffs"); *id.* at 406 n.16 (distinguishing "obtaining a financial benefit for himself" and a "payoff": the "entire character [of the demonstration] changed . . . when it was used as a pressure device *to exact the payment of money*") (emphasis added). *See*

[32]The decision below would also wreak havoc in the interpretation of other federal statutes that have the obtaining of property as an element. *E.g.*, 10 U.S.C. § 921 (larceny and wrongful appropriation under Uniform Code of Military Justice); 11 U.S.C. § 727(a)(4)(C) (bankruptcy discharge); 15 U.S.C. § 77q(a)(2) (fraudulent interstate transactions); 15 U.S.C. § 1703(a)(2)(B) (fraud in land transactions); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

also Evans v. United States, 504 U.S. 255, 259-60 (1992) (common law, from which Hobbs Act borrowed, required that public official "took . . . money" under color of his office in order to constitute extortion).

The result in *Enmons* would have to be different under the rationale of the decision below. Indeed, the Seventh Circuit's distorted view of Hobbs Act extortion is radically at odds with both the majority *and the dissent* in *Enmons*.

In *Enmons*, the question was whether the Hobbs Act applied to labor violence in support of higher wages and other employee benefits. This Court divided 5-4 over the question, with the majority holding that "the use of violence to achieve legitimate union objectives" was not the "wrongful" obtaining of property for purposes of Hobbs Act extortion. 410 U.S. at 400. *See infra* §II(A)(1)(e). But not a single Justice suggested that the violent destruction of property that had occurred in that case could itself qualify as the extortionate "obtaining" of property under the Hobbs Act. Yet the Seventh Circuit endorsed precisely such a theory.

The decision below would plainly nullify the holding in *Enmons*. Instead of prosecuting violent union protesters for the extortionate obtaining of better wages and benefits (an "obtaining" that, under *Enmons*, is not "wrongful"), prosecutors -- under the Seventh Circuit's faulty rationale -- could simply charge the protesters with extortionate "obtaining" of the property or rights damaged or interfered with, i.e., by causing a "loss to, or interfering with the rights of" (OR Pet. App. 36a) others. The "obtaining of property" element would be satisfied by the damage to transformers (as in *Enmons*) or to other company property, or by interference with the liberty of management or employees, for example, to cross the strike line. The legitimacy or wrongfulness of the ultimate *aim* of "obtaining wages" would be irrelevant, because the unlawful *means* of "obtaining, by damage of or interference with,

property," according to the court below, would satisfy the Hobbs Act.

The rationale of the decision below would thus render meaningless the entire debate in *Enmons*. Whether obtaining higher wages is "wrongful" or not under the Hobbs Act is wholly beside the point if wrongful "obtaining property" (as opposed to wrongful "causing a loss" or "interfering with rights") is not even a necessary element of Hobbs Act extortion.[33]

The *Enmons* majority was insistent that the Hobbs Act would not proscribe misconduct on a picket line, even a physical assault. 410 U.S. at 404-05. The dissent was even more emphatic, dismissing as "nonsense" the notion that a "fistfight on a picket line" could violate the Hobbs Act. *Id.* at 418 n.17 (Douglas, J., dissenting). Yet in the present case it was precisely demonstration misconduct -- the nonviolent sit-ins themselves, plus several scattered[34] incidents of alleged violence[35] -- that formed the very core of both respondents' case and the jury's verdict, as well as the basis for the Seventh Circuit's affirmance under the Hobbs Act. *Supra* pp. 4-5 & nn. 7-10; OR Pet. App. 1a-2a, 23a, 35a-36a.

---

[33]The potential for businesses to use RICO actions based on an expansive concept of Hobbs Act extortion against union activists has not gone unnoticed by judges and commentators. *See* OR Resp. at 4 n.2.

[34]A comparison with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is instructive. In *Claiborne*, there were at least ten violent incidents in one county of Mississippi over a seven-year period. *Id.* at 888, 893, 898, 904-06, 920. In the present case, the jury found only four acts or threats of violence, OR Pet. at 4 n.5, in the context of nationwide demonstrations over a fourteen-year period, *id.* at 6-7. This Court described the violent acts in *Claiborne* as "isolated," 458 U.S. at 924, and "relatively few," *id.* at 933. *A fortiori*, the same is true here.

[35]Petitioners vigorously deny any charge of violence. *Supra* p. 2 & n.2. Indeed, OR demanded all "rescue" demonstration participants to sign a pledge of nonviolence. *Id.*

i. Plain meaning of "obtaining"

Interpretation must begin with the text of the statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). "Obtain" means "to come into the possession or enjoyment of (something) . . . to acquire [or] get." *Oxford English Dictionary*, vol. 10, at 669-70 (2d ed. 1989). *Accord Black's Law Dictionary* 972 (5th ed. 1979) ("obtain" means "[t]o get hold of . . . ; to get possession of; to procure; to acquire in any way"). "Obtaining . . . from" is not synonymous with "part with," which means "to let go, *give up* [or] surrender." *Oxford English Dictionary*, vol. 11, at 262 (emphasis added).

The plain meaning of "obtaining . . . from" thus includes more than merely making someone "lose" or "give up" something. *Evans*, 504 U.S. at 264-65, 268 (equating "obtain" with "receive"). *See generally* Note, *supra* p. 25, at 704-12 (tracing extortion from the common law through the Hobbs Act and concluding that extortionate "obtaining" requires not only that a victim be deprived of property, but also that someone get the property as a result of the deprivation).

ii. Meaning of "obtaining" under New York extortion law

Under New York law -- the source of the language of the Hobbs Act -- "obtaining" means "gaining," not just "denying." *Enmons*, 410 U.S. at 406 n.16 (1973).

The Hobbs Act took its relevant language from the extortion law of New York. *Id.*; *Evans*, 504 U.S. at 261 n.9, 264-65. Under New York law, it is well-settled that the crime of extortion requires an unlawful taking. *Enmons*, 410 U.S. at 406 n.16 (under New York statute, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled

to *receive*"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "*receiv[ing]* a payoff") (emphasis added; quoting and citing New York cases). *See People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)); *People v. Ryan*, 232 N.Y. 234, 236, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient). *See also People v. Squillante*, 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) ("'[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something"); *United States v. Nedley*, 255 F.2d 350, 355-58 (3d Cir. 1958).[36]

New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Field Code § 613 (1865) (emphasis added). The commentary explained:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement . . . . *All four include the criminal acquisition of the property of another*. . . . In extortion, there is again a taking . . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

[36]In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery" in the Hobbs Act did not extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57. The same term "obtaining" is used in the extortion subsection.

Field Code, Chapter IV, § 584 com. (emphasis added). The Field Code, in turn, was one of the sources for the Hobbs Act. *Evans*, 504 U.S. at 261 n.9.

iii. "Obtaining" at common law: extortion vs. coercion

Furthermore, the elimination of the "obtaining" element of "extortion" is completely inconsistent with the distinction at common law -- incorporated into the Hobbs Act -- between "extortion" and "coercion." "Coercion" is not a predicate act under RICO. 18 U.S.C. § 1961(1)(A). *See, e.g., United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). (NOW concedes that "mere coercion" is insufficient to satisfy the elements of extortion. Opp. at 16.) To read the Hobbs Act to include "coercion" would expand RICO beyond its statutory limits.

"Coercion" is the criminal compulsion of another, by means of threats, to do or not do something. *See* 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 49-50 (1989) (coercion as independent offense). Coercion is a creature of statute, much broader than extortion. *Id.* Extortion, by contrast, is limited to the *obtaining of property* by means of threat. *Id.* § 40. The "obtaining" element in the Hobbs Act incorporates this distinction.

"[A] statutory term is generally presumed to have its common-law meaning." *Taylor v. United States*, 495 U.S. 575, 592 (1990). Indeed,

> "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as

satisfaction with widely accepted definitions. not as a departure from them."

Evans, 504 U.S. at 259-60 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). *Evans* explicitly applied this rule to the terms of the Hobbs Act: "our construction of the statute is informed by the common-law tradition from which the term of art was drawn and understood." 504 U.S. at 268. This "common-law tradition" demonstrates the flaw in the Seventh Circuit's failure to respect the distinction between extortion and coercion.

(a). Extortion at common law

At common law, extortion unquestionably required an *acquisition* of *property*. *See* 4 W. Blackstone,[37] *Commentaries* *141 (extortion as "an abuse of public justice, which consists in any officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due, or before it is due") (emphasis added); 3 E. Coke, *First Institute* 584 (J. Thomas ed. 1826) ("[e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing* . . . either that is not due, or more than is due, or before it be due") (emphasis added).

> [E]xtortion in a large sense signifies any oppression under colour of right; but . . . in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

[37] "The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone's . . . ." Lindgren, *The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 862 (1988).

W. Hawkins,[38] *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) (emphasis added). The Hobbs Act, by employing the term "obtaining" from common law, New York law, and the Field Code, incorporated this same requirement of an *acquisition of property*.

(b). Statutory distinction between extortion and coercion

The Model Penal Code maintained the distinction between the (originally statutory) crime of coercion and the (originally common-law) crime of extortion. Coercion appears in Section 212.5, which "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment." Model Penal Code § 212.5 cmt. 2 at 264 (1980) (emphasis added). Extortion, by contrast, appears in Section 223.4, which "deals with situations where threat rather than force . . . is the method employed to deprive the victim of his *property*." *Id.* § 223.4 cmt. 1 at 201-02 (emphasis added). As in the Hobbs Act, the Model Penal Code defines extortion to require that one "obtains property of another," *id.* § 223.4, and to "obtain" property means "to bring about a transfer . . . of a legal interest in the property, whether to the obtainer or another," *id.* § 223.0(5) (definitions). The obtaining of property thus distinguishes extortion from coercion, as coercion involves the restriction of another's freedom of action by threat. *Id.* § 212.5 cmt. 2 at 266; *id.* § 223.4 cmt. 1 at 203.

Many states follow the Model Penal Code and distinguish extortion and coercion by categorizing them as separate

[38] "Hawkins's definition of extortion was cited, paraphrased, or followed by the *Crown Circuit Companion*, Mathew Bacon in *A New Abridgement of the Law*, William Russell in *A Treatise on Crimes and Misdemeanors*, and Francis Wharton in his influential American treatise, *A Treatise on the Criminal Law*." Lindgren, *supra* note 37, at 865 (footnotes omitted).

statutory offenses. Blakey & Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability (Under RICO)*, 33 Am. Crim. L. Rev. 1345, 1660 n.25 (1996) (collecting statutes). Other states recognize only the crime of extortion, not coercion. *Id.* at 1660 n.26. Still other states combine the two offenses under one heading. *Id.* at 1660 n.27.

The Seventh Circuit failed to recognize coercion as a separate offense. Yet "[t]he distinction is not trivial: . . . it is of the essence of extortion -- not only in New York law but, more importantly, in the law generally -- that one compel another to surrender *property*." *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992) (emphasis in original) (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)).

Unlawful acts of protest, like any unlawful acts, may in some sense "deprive" others of something. But "to deprive" is simply not the same as "to obtain from." Petitioners here were not business competitors of the abortion facilities or their employees. They stood to gain nothing by the reduction in the abortionists' business. Even assuming, *arguendo*, that abortion businesses lost "property" because of petitioners, *but see infra* § II(A)(1)(b), neither the petitioners nor anyone associated with them *obtained* that "property."[39]

[39]The Third Circuit holding in the *McMonagle* case, *supra* note 30, that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation, is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself -- a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United States v. Anderson*, 716 F.2d 446 (continued...)

A defendant may "obtain" property for purposes of the Hobbs Act either by *personally* receiving a direct payment from the victim or by obtaining property for *another* person. *United States v. Green*, 350 U.S. 415 (1956). In the case at bar, however, neither the district court nor the Seventh Circuit required proof of either alternative.

The antiwar protester who gets in a shoving match with a counter-demonstrator may be guilty of battery, but he is not guilty of extortion: the protester *obtains no property*. Nor do other incidents of misconduct at protests, or even deliberate civil disobedience, rise to the level of Hobbs Act extortion *unless the perpetrator "obtains" or tries to "obtain" property*. As this Court has observed, the "entire character" of a protest "change[s] from legality to criminality" when the protest is used "to exact the payment of money as a condition of its cessation." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (editing marks and citation omitted).

b. No "property"

Hobbs Act extortion requires "the obtaining of *property*," 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners did not "obtain" any tangible property of respondents. Tr. 4327. Nor is there any claim that defendants "obtained" intangible property like shares of stock or copyrights. Reliance on intangible rights -- such as a "right to abortion" or a "right to perform abortion

[39](...continued)
(7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the effect of threats on interstate commerce. The record included evidence that defendant had extorted $300 from the victim. *Id.* at 447. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act is a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive.

services," Tr. 567 (NOW's opening statement of what was "extorted") -- must fail. Such intangible liberty interests do not constitute "property" for purposes of the Hobbs Act.[40]

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's liberty. But the Hobbs Act forbids the wrongful obtaining of *property* (extortion), not the wrongful denial of *liberty* (coercion). To treat "rights" as "property" under the Hobbs Act would be to remove all limits whatsoever on the kind of injury necessary for federal criminal extortion.

This Court has repeatedly distinguished between "property," on the one hand, and "intangible rights," on the other, when construing the "obtaining property" element of federal criminal statutes. *E.g.*, *McNally v. United States*, 483 U.S. 350, 356, 358, 360 (1987); *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000).

McNally is illustrative. The statute at issue there prohibited use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. The government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud," *id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an obvious

---

[40]The jury was instructed that "property rights" included

> anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.

JA 136. *See also* JA 143 (verdict form lumping together extortion of patients, prospective patients, and abortion staff). Hence, the judgment cannot be sustained unless each of these intangible rights qualifies as "property" under the Hobbs Act.

difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. This Court refused to remove this statutory limitation: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail fraud statute] as limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of intangible "rights" as property would likewise leave the boundaries of the Hobbs Act ambiguous and would put the federal government (and civil RICO plaintiffs) in the business of "setting standards" in protest movements. Did the civil rights activists of the 1960's extort owners of diners of "property" when they obstructed the owners' "right to serve only the customers they chose"? Did these activists extort white bus passengers of their "property" by making these passengers give up their "right to sit in the front of the bus"? Certainly not. "Liberty" does not equal "property" under the Hobbs Act.

NOW's claim requires stretching the Hobbs Act even beyond protection of intangible property. *Cf. Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (wrongful obtaining of intangible property). "Intangible *property*" (such as shares in a corporation or trademark rights) does not equate with "intangible *rights*." A liberty interest such as the "right to provide services" or the "right to make business decisions" is, in the words of *Carpenter*, "an interest too ethereal in itself to fall within the protection" of the "property" concept, *id.* at 25.

The Seventh Circuit's essentially limitless theory of property rights, like the prosecution theories in *Cleveland*, must be

rejected "not simply because they stray from traditional concepts of property," 531 U.S. at 24, but also because this approach "invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress," *id.* This Court warned in *Cleveland* that a novel expansion of the statutory term "property" "would subject to federal . . . prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* The same concern applies here. *Infra* § II(A)(2)(b).

Invoking the rule of lenity, this Court noted in *Cleveland* that any ambiguity about the term "property" must be resolved in favor of a less expansive meaning. 531 U.S. at 25. Highly apropos of the present case, this Court found the rule of lenity "especially appropriate" in construing a federal crime which "is a predicate offense under RICO." *id. Accord infra* § II(A)(2)(c).

c. No "consent"

The Hobbs Act requires proof of the "consent" of the victim. NOW has shown no such extraction of consent.

Protest activity inherently seeks changed conduct on the part of others. But the Hobbs Act does not proscribe "the securing of altered behavior by another with his consent," but rather "the obtaining of property from another, with his consent," 18 U.S.C. § 1951(b)(2). Thus, the "consent" extracted must be linked to the obtaining of property. The mere pressuring of others to "consent" to stop obtaining or providing abortions is irrelevant, as petitioners did not "obtain" that conduct (even if such "conduct" were "property").

Moreover, damage to or interference with property is not the same as extortion because the consent of the victim is irrelevant. The purpose of the vandal or tortfeasor is not to obtain permission for anything.

Any unlawful activity exerts pressure on those who wish to avoid the consequences of that activity. Any property damage

"forces" the owner to replace, repair, or endure the impairment of property. But the Hobbs Act does not outlaw the universe of wrongful conduct: the deliberate seeking of the *consensual* surrendering, to the extortionist or his designee, of property that the extortionist obtains, remains a critical element of this statutory offense.

d. No "force, violence, or fear"

Conduct typical of civil disobedience -- sit-ins, pickets, vehement rhetoric, pouring blood or paint on property or things, damaging weapons components -- does not constitute "force, violence, or fear" under the Hobbs Act. The judgment below, however, rests largely upon precisely such nonviolent protest activity. *Supra* pp. 4-5 & nn.7-10. Hence, the verdict of predicate extortion must fall. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)"). As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11,912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Plaintiffs' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 500 U.S. 257, 272 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

For forty years after the passage of the Hobbs Act, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics -- including

lawbreaking in the form of trespass, vandalism, obstruction, mass picketing, and incidental scuffling -- constitutes federal criminal extortion. One novel and aberrant appellate decision, *see supra* note 30, cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are part of the American experience. Characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country toward totalitarian oppression of dissent. The Seventh Circuit's theory would make an extortionist out of everyone from Gandhi, to Martin Luther King, Jr., to the temperance activists of the Nineteenth Century, to the leaders of the Boston Tea Party, and would convert the Hobbs Act into a weapon for combatting anti-nuclear protesters and animal rights activists. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *Enmons*, 410 U.S. at 409), "it appears to us that acts of vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

e. No "wrongful" purpose

Hobbs Act extortion requires the "wrongful" use of actual or threatened force, violence, or fear. § 1951(b)(2). The "wrongfulness" in question must be the wrongfulness of the *goal* or *purpose* of the conduct, not the wrongfulness of the *means*. *United States v. Enmons*, 410 U.S. 396 (1973).

In *Enmons*, striking employees seeking higher wages and benefits committed serious acts of property damage: "firing high-powered rifles at three Company transformers, draining the oil from a Company transformer, and blowing up a transformer

substation owned by the Company." *Id.* at 398. This Court affirmed the dismissal of a Hobbs Act indictment. *Id.* at 398, 412.

In *Enmons*, the government argued that the "wrongfulness" element was satisfied by the property destruction. This Court disagreed:

> The term "wrongful," which on the face of the statute modifies the use of each of the enumerated means of obtaining property -- actual or threatened force, violence, or fear -- would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the Government acknowledges, any violence or force to obtain property is "wrongful."

Id. at 399-400 (footnotes omitted). Rather, the wrongfulness must attach to the *objective* of the conduct:

> [T]he literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve *legitimate* union *objectives*, such as higher wages in return for genuine services which the employer seeks. In that type of case, there has been no "wrongful" taking of the employer's property . . . .

Id. at 400 (emphasis added). "In short, when the *objectives* of the [protest activities] change[] from legitimate . . . ends to personal payoffs, then the actions bec[o]me extortionate." *Id.* at 406 n.16 (emphasis added).

No language in the Hobbs Act refers in any way to unions or labor. Hence, the principle of *Enmons* cannot arbitrarily be confined to the labor context. In the present case, petitioners' objective was to stop abortion. As respondents concede, Tr. 4315, this is a legitimate objective, even if some of petitioners' means were unlawful. *Bray v. Alexandria Women's Health*

Clinic, 506 U.S. 263, 270, 274 (1993). "Whether one agrees or disagrees with the goal of preventing abortion, that goal . . . is proper and reasonable . . . ." *Id.* at 274. Hence, under *Enmons*, the "wrongfulness" element was lacking.

2. Rules of statutory construction

The Seventh Circuit's theory of Hobbs Act extortion profoundly contradicts several well-established norms of statutory construction.

a. Avoiding constitutional difficulties

Legislation ought not, if a reasonable alternative is present, be interpreted in a manner that raises constitutional difficulties. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). This rule of construction mandates fidelity to all of the elements of Hobbs Act extortion -- including the elements missing from petitioners' conduct. To apply the Hobbs Act to cover social protest activities would raise serious First Amendment and due process difficulties.

First, the right to free speech shelters a broad range of expressive activity, including that which many people might find offensive, coercive, and disruptive. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (pressuring real estate broker to cease certain practices); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycotts enforced through public embarrassment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (attacking religious beliefs). Even when protest activity inflicts economic injury, it does not thereby become unlawful. *Claiborne Hardware*; *Thornhill v. Alabama*, 310 U.S. 88 (1940). Yet the Seventh Circuit's theory of extortion threatens "coercive" expression. Moreover, the threat of extortion prosecutions and RICO suits for any coercive conduct (even conduct of someone merely "associated" with the "enterprise") exerts a profound "chilling effect" on legitimate free speech

activities.

Second, the *post hoc* categorization of traditional protest methods as "extortionate" poses due process issues of unfair surprise. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (unconstitutional to subject "sit-in" to unforeseeable expansion of criminal law). It would be difficult to overstate the novelty -- and bizarre nature -- of the Seventh Circuit's view that "interference with rights" equals the extortionate "obtaining of property." No state or federal criminal extortion charges were brought for *any* of the dozens of supposedly "extortionate" sit-ins or other acts on which the RICO claim was based. *See, e.g.*, Tr. 1777-78 (Lt. Pyrdum); RICO Case Statement [Amended] (Oct. 31, 1994) at 5-6, Ex. A, B (listing criminal charges/convictions for alleged predicate acts, none of which are for "extortion"). Indeed, it would be "an unprecedented feat of interpretative necromancy," *Holmes Group*, 122. S. Ct. at 1895, for a prosecutor to charge that a sit-in protest was felony "extortion," yet that was precisely the Seventh Circuit's theory. As this Court stated in an analogous context, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *Enmons*, 410 U.S. at 410. To expand the Hobbs Act in this startling fashion, therefore, and to make that *post hoc* expansion the basis for liability under RICO, raises very serious due process concerns.

This Court should therefore reject the Seventh Circuit's perversely expansive reading of the Hobbs Act.

b. Federalism

This Court should be loathe to interpret federal statutes in ways that "upset the usual constitutional balance of federal and state powers." *New York v. United States*, 505 U.S. 144, 170 (1992) (internal quotation marks and citation omitted). *See generally Gregory v. Ashcroft*, 501 U.S. 452 (1991). "[W]e will

not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as trespass, vandalism, and obstruction of public passage. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.), *cert. denied*, 423 U.S. 837 (1975).

This Court expressed this very caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Enmons, 410 U.S. at 411 (citations omitted).

Congress has, of course, adopted a scheme of national labor regulations, yet *Enmons* held that there was no clear statement of intent to police the limits of labor demonstrations through the Hobbs Act. Here, there is no national scheme of social protest regulation; *a fortiori*, application of the Hobbs Act to police such protests violates the "clear statement" principle.[41]

[41]Congress knows how to make a clear statement of intent that a statute apply to protest activity. *E.g.*, 18 U.S.C. § 248 (FACE). The present case was not brought under FACE, however, and the Hobbs Act contains no such clear statement.

c. Rule of lenity

Any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (and cases cited). The Seventh Circuit's distortion of the Hobbs Act stands this rule on its head, as the Seventh Circuit's interpretation requires both creating ambiguity by rejecting the clear meaning of statutory terms, and then resolving that contrived ambiguity in favor of an extremely broad interpretation.

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. This rule serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

As a criminal law, the Hobbs Act is subject to this rule of strict construction. *Enmons*, 410 U.S. at 411; *McCormick*, 500 U.S. at 272-73. This Court must therefore reject the Seventh Circuit's bizarre expansion of federal criminal "extortion." A protest sit-in is *not* extortion under the Hobbs Act.

B. Impact of Hobbs Act Error on Disposition of Case

Respondents have never claimed to be able to prove predicate extortion under a proper understanding of the Hobbs Act. Hence, this Court should reverse the Seventh Circuit and remand with instruction that the court of appeals direct the entry of judgment for petitioners on those claims.

Moreover, because state extortion offenses must satisfy a federal minimum essentially equivalent to the Hobbs Act in order to qualify as RICO predicates, those state predicates are also irremediably defective. *See United State v. Nardello*, 393

U.S. 286, 290, 293, 295 (1969); *Taylor v. United States*, 495 U.S. 575, 590-91, 599-602 (1990). *See* OR Pet. at 23-24. NOW's Travel Act predicates, meanwhile, fall with the Hobbs and state extortion predicates. OR Pet. at 4 n.6, 26 n.27. Accordingly, this Court should reverse and remand with instruction to direct the entry of judgment for petitioners on all counts. *See also supra* p. 26 (petitioners attacked NOW's extortion theory with various dispositive motions).

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted this 12th of July, 2002,

Walter M. Weber
Larry L. Crain
David A. Cortman
Robert W. Ash
American Center for Law and Justice
1650 Diagonal Road, 5th Fl.
Alexandria, VA 22314
(703) 740-1450

Jay Alan Sekulow
Counsel of Record
Colby M. May
Stuart J. Roth
James M. Henderson, Sr.
Vincent P. McCarthy
American Center for Law and Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Thomas P. Monaghan
Charles E. Rice
Center for Law and Justice International
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

Attorneys for Petitioner Operation Rescue

(33) (29)

Nos. 01-1118 & 01-1119

IN THE

Supreme Court of the United States

SEP 17

JOSEPH SCHEIDLER, *ET AL.*,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

A. STEPHEN HUT, JR.
DAVID W. OGDEN
TERRY A. MARONEY
KIMBERLY A. PARKER
RACHEL A. SHACHTER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

KERRY A. MILLER
33 West Monroe Street
Chicago, IL 60601
(312) 507-2072

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 663-3100

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Chicago, IL 60606
(312) 207-6400

Counsel for Respondents

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether one who uses violence and threats of violence to induce a business and its customers to conform their use of their property to his or her demands, commits extortion under the Hobbs Act, 18 U.S.C. § 1951.

2. Whether, as a matter of inherent authority or statutory grant, the federal courts have power to enjoin ongoing racketeering violations in lawsuits brought by the victims of such racketeering activity under the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. §§ 1961 *et seq.*

PARTIES TO THE PROCEEDING

Petitioners are Joseph M. Scheidler; the Pro-Life Action League, Inc.; Andrew D. Scholberg; Timothy Murphy; and Operation Rescue ("OR"). Respondents include the National Organization for Women, Inc. ("NOW"), on behalf of itself and its members and on behalf of the class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by Petitioners' unlawful conduct. Respondents also include the National Women's Health Organization of Summit, Inc., d/b/a/ Summit Women's Health Organization, and the National Women's Health Organization of Delaware, Inc., d/b/a/ Delaware Women's Health Organization, on behalf of themselves and the class of all women's health care centers in the United States at which abortions are provided.

RULE 29.6 STATEMENT

Respondents National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc., d/b/a Summit Women's Health Organization; and National Women's Health Organization of Delaware, Inc., d/b/a Delaware Women's Health Organization, do not have any parent corporations and do not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES viii

TABLE OF ABBREVIATIONS xvii

STATEMENT 1

The Proof at Trial 1

The Accommodations for Petitioners' First Amendment Rights 7

Proceedings on Remedy 9

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. PETITIONERS COMMITTED HOBBS ACT EXTORTION BY WRONGFULLY USING FORCE AND VIOLENCE TO MAKE RESPONDENTS SURRENDER THEIR PROPERTY TO PETITIONERS. 12

A. Petitioners Sought or Secured Control Over Respondents' "Property." 13

1. "Property" historically has encompassed the right lawfully to control one's assets. 14

2. The Hobbs Act's origins show property includes the right to control both tangible and intangible assets. 18

TABLE OF CONTENTS—Continued

Page

B. By Seeking To Get Control of the Use and Disposition of Respondents' Property, Petitioners Sought To "Obtain" That Property. 24

C. Petitioners Used Threats and Force To Obtain "Consent." 29

D. Petitioners' Conduct Was "Wrongful." 31

II. EVEN APART FROM THE HOBBS ACT PREDICATES, THE JUDGMENT WOULD STAND. 33

III. RICO PERMITS PRIVATE LITIGANTS TO SEEK INJUNCTIVE RELIEF. 36

A. RICO Expressly Authorizes Injunctive Relief to Private Parties. 36

B. Petitioners Improperly Attempt To Narrow RICO. 41

C. RICO's Legislative History Does Not Help Petitioners. 43

D. Private Injunctions Serve RICO's Express Purpose and Public Policy. 46

IV. APPLICATION OF RICO TO PETITIONERS' PATTERN OF WRONGFUL THREATS, FORCE, AND VIOLENCE WILL NOT CHILL LAWFUL PROTEST. 48

CONCLUSION 50

APPENDIX A: N.Y. Penal Code arts. 80, 48 (1945) 1a

APPENDIX B: Excerpts of Plaintiffs' Exhibit 14B 5a

APPENDIX C: Excerpts of Plaintiffs' Exhibit 23B 7a

APPENDIX D: Excerpts of Plaintiffs' Exhibit 35C 9a

TABLE OF CONTENTS—Continued

Page

APPENDIX E: Excerpts of Plaintiffs' Exhibit 435B 11a

APPENDIX F: Excerpts of Plaintiffs' Exhibit 628 ..... 13a

APPENDIX G: Excerpts of Plaintiffs' Exhibit 674 ..... 15a

APPENDIX H: Excerpts of Plaintiffs' Exhibit 726 ..... 17a

APPENDIX I: Plaintiffs' Exhibit 729 ..... 19a

APPENDIX J: Excerpts of Plaintiffs' Exhibit 801 ..... 21a

APPENDIX K: Excerpts of Trial Testimony 23a

TABLE OF AUTHORITIES

CASES

Page(s)

A.S. Beck Shoe Corp. v. *Johnson*, 274 N.Y.S. 946 (Sup. Ct. 1934) 32

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 40

Anderson v. *Janovich*, 543 F. Supp. 1124 (W.D. Wa. 1982) 41

Atlas Roofing Co. v. *Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977) 39, 42

Bell v. *Hood*, 327 U.S. 678 (1946) 39

Bennett v. *Berg*, 710 F.2d 1361 (8th Cir. 1983) 47

Bianchi v. *United States*, 219 F.2d 182 (8th Cir. 1955) 21

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 50

Brennan v. *United States*, 867 F.2d 111 (2d Cir. 1989) 34

Buchanan v. *Warley*, 245 U.S. 60 (1917) 16

Califano v. *Yamasaki*, 442 U.S. 682 (1979) 11, 36, 39

California v. *American Stores Co.*, 495 U.S. 271 (1990) 47

Carbo v. *United States*, 314 F.2d 718 (9th Cir. 1963) 27

Carey v. *Piphus*, 435 U.S. 247 (1978) 15

Carpenter v. *United States*, 484 U.S. 19 (1987) 15, 17

Cedric Kushner Promotions, Ltd. v. *King*, 533 U.S. 158 (2001) 40

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 45

Chambers Development Co. v. *Browning-Ferris Industries*, 590 F. Supp. 1528 (W.D. Pa. 1984) 38, 41

Chitwood v. *McMillan*, 1 S.E.2d 162 (S.C. 1939) 16

Cleveland v. *United States*, 531 U.S. 12 (2000) 15

TABLE OF AUTHORITIES—Continued

Page(s)

College Savings Bank v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) 17
Connecticut National Bank v. *Germain*, 503 U.S. 249 (1992) 38
County of Cook v. *Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982) 41
Drye v. *United States*, 528 U.S. 49 (1999) 17, 18
Estate of Cowart v. *Niklos Drilling Co.*, 505 U.S. 469 (1992) 37
Evans v. *United States*, 504 U.S. 255 (1992) 20, 21, 26
Fireman's Fund Insurance Co. v. *Stites*, 258 F.3d 1016 (9th Cir. 2001) 41
Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) 40
Garcia v. *United States*, 469 U.S. 70 (1984) 43
Gillespie v. *People*, 188 Ill. 176 (1900) 16
Griffin v. *United States*, 502 U.S. 46 (1991) 24, 35
Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) 38, 39
H.J. Inc. v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) 35, 40
Haynes v. *United States*, 390 U.S. 85 (1968) 30
In re Bronson, 150 N.Y. 1 (1896) 19
Johnson v. *United States*, 520 U.S. 461 (1967) 35
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 17
Leonard Duckworth, Inc. v. *Michael Field & Co.*, 516 F.2d 952 (5th Cir. 1975) 16
Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) 23
McNally v. *United States*, 483 U.S. 350 (1987) 15, 17
Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 40
Minnesota v. *Northern Securities Co.*, 194 U.S. 48 (1904) 41

TABLE OF AUTHORITIES—Continued

Page(s)

Morse v. *Swank, Inc.*, 459 F. Supp. 660 (S.D.N.Y. 1978) 16
Motorola Credit Corp. v. *Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) 38
Muscarello v. *United States*, 524 U.S. 125 (1998) 33
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 49
NOW v. *Scheidler*, 510 U.S. 249 (1994) 1, 23, 31, 40, 43
National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) 40
Neder v. *United States*, 527 U.S. 1 (1999) 35
Northeast Women's Center, Inc. v. *McMonagle*, 868 F.2d 1342 (3d Cir. 1989) 16, 23, 24
Oswego Falls Pulp & Paper Co. v. *Stecher Lithograph Co.*, 215 N.Y. 98 (1915) 16
Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) 41, 42
People ex rel. Short v. *Warden*, 130 N.Y.S. 698 (App. Div. 1911), *aff'd*, 99 N.E. 1116 (N.Y. 1912) 19, 20
People v. *Ashworth*, 222 N.Y.S. 24 (App. Div. 1927) 25
People v. *Baker*, 88 Cal. App. 3d 115 (1978) 34
People v. *Barondess*, 31 N.E. 240 (N.Y. 1892) 19, 20
People v. *Cadman*, 57 Cal. 562 (1881) 21
People v. *Eboli*, 313 N.E.2d 746 (N.Y. 1974) 26
People v. *Hughes*, 32 N.E. 1105 (N.Y. 1893) 20
People v. *Learman*, 28 N.Y.S.2d 360 (App. Div. 1941) 15
People v. *Powell*, 50 Cal. App. 436 (Dist. Ct. App. 1920) 26
People v. *Ryan*, 232 N.Y. 234 (1921) 26
People v. *Scheppa*, 295 N.Y. 359 (1946) 26

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Sheridan*, 174 N.Y.S. 327 (App. Div. 1919).....20
People v. *Spatarella*, 34 N.Y.2d 157 (1974).....19, 20, 28
People v. *Squillante*, 185 N.Y.S.2d 357 (Sup. Ct. 1959).....20
People v. *Weinseimer*, 102 N.Y.S. 579 (App. Div.), *aff'd*, 83 N.E. 1129 (N.Y. 1907).....20
People v. *Wisch*, 296 N.Y.S.2d 882 (Sup. Ct. 1969).....26
Perez v. *United States*, 402 U.S. 146 (1971).....18
Phillips v. *Washington Legal Foundation*, 524 U.S. 156 (1998).....14
Planned Parenthood of Columbia/Willamette, Inc. v. *American Coalition of Life Activists*, 23 F. Supp. 2d 1182 (D. Or. 1998), *aff'd in part on other grounds*, 290 F.3d 1058 (9th Cir. 2002).....31
Planned Parenthood of Columbia/Willamette, Inc. v. *American Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996), *aff'd in part on other grounds*, 290 F.3d 1058 (9th Cir. 2002).....23
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946).....39
Religious Technology Center v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986).....36, 44, 46
Reves v. *Ernst & Young*, 507 U.S. 170 (1993).....40
Rotella v. *Wood*, 528 U.S. 549 (2000).....47
Rutkin v. *United States*, 343 U.S. 130 (1952).....27
Salinas v. *United States*, 522 U.S. 52 (1997).....40, 43
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985).....40, 43, 44, 46, 47
Solid Waste Agency of Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001).....45
State v. *Cadigan*, 50 A. 1079 (Vt. 1901).....15
State v. *Taylor*, 632 P.2d 892 (Wash. Ct. App. 1981).....34

TABLE OF AUTHORITIES—Continued

Page(s)

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998).....37
Stirone v. *United States*, 361 U.S. 212 (1960).....13
Tafflin v. *Levitt*, 493 U.S. 455 (1990).....43
Tandy v. *City of Hopkinsville*, 169 S.W. 703 (Ky. 1914).....18
Taylor v. *United States*, 495 U.S. 575 (1990).....33
Town of West Hartford v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990).....15, 23
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979).....40
United States v. *564.54 Acres of Land*, 441 U.S. 506 (1979).....17
United States v. *Albertson*, 971 F. Supp. 837 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).....32
United States v. *Anderson*, 716 F.2d 446 (7th Cir. 1983).....23
United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999).....23, 24, 29
United States v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979).....31
United States v. *Clemente*, 640 F.2d 1069 (2d Cir. 1981).....27
United States v. *Craft*, 122 S. Ct. 1414 (2002).....16, 17, 45
United States v. *Culbert*, 435 U.S. 371 (1978).....31, 33
United States v. *Debs*, 949 F.2d 199 (6th Cir. 1991).....22, 32
United States v. *Enmons*, 410 U.S. 396 (1973).....30, 32
United States v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977).....33
United States v. *Frazier*, 560 F.2d 884 (8th Cir. 1977).....27
United States v. *General Motors Corp.*, 323 U.S. 373 (1945).....14
United States v. *Green*, 350 U.S. 415 (1956).....21, 27

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Hairston*, 46 F.3d 361 (4th Cir. 1995).....27
United States v. *Hoelker*, 765 F.2d 1422 (9th Cir. 1985).....22
United States v. *Hyde*, 448 F.2d 815 (5th Cir. 1971).....27
United States v. *Jacobs*, 451 F.2d 530 (5th Cir. 1971).....27
United States v. *Lewis*, 797 F.2d 358 (7th Cir. 1986) 22, 27
United States v. *Local 560, International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985).....22
United States v. *Mazzei*, 521 F.2d 639 (3d Cir. 1975).....25
United States v. *Mitchell*, 463 F.2d 187 (8th Cir. 1972).....31
United States v. *Mulder*, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1344 (2002).....32
United States v. *Nadaline*, 471 F.2d 340 (5th Cir. 1973).....22, 23
United States v. *Nardello*, 393 U.S. 286 (1969).....18, 33, 34
United States v. *Overton*, 470 F.2d 761 (2d Cir. 1972).....23
United States v. *Panaro*, 266 F.3d 939 (9th Cir. 2001).....28
United States v. *Peacock*, 654 F.2d 339 (5th Cir. 1981).....34
United States v. *Provenzano*, 334 F.2d 678 (3d Cir. 1964).....27
United States v. *Rastelli*, 870 F.2d 822 (2d Cir. 1989).....16
United States v. *Santoni*, 585 F.2d 667 (4th Cir. 1978).....22
United States v. *Starks*, 515 F.2d 112 (3d Cir. 1975).....27, 31
United States v. *Stephens*, 964 F.2d 424 (5th Cir. 1992).....22

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Stillo*, 57 F.3d 553 (7th Cir. 1995) 27
United States v. *Sturm*, 870 F.2d 769 (1st Cir. 1989).....32
United States v. *Thomas*, 114 F.3d 228 (D.C. Cir. 1997).....34
United States v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969).....22, 23, 28
United States v. *Turkette*, 452 U.S. 576 (1981)..34, 40, 43, 47
United States v. *Zappola*, 677 F.2d 264 (2d Cir. 1982).....32
United States v. *Zemek*, 634 F.2d 1159 (9th Cir. 1980).....28
Viacom International, Inc. v. *Icahn*, 747 F. Supp. 205 (S.D.N.Y. 1990), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991).....32
Weeks v. *Angelone*, 528 U.S. 225 (2000).....30
Wilkinson v. *Powe*, 1 N.W.2d 539 (Mich. 1942).....16

STATUTES

Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. § 25 42
15 U.S.C. § 26 43
Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994).....9, 30
Hobbs Act, 18 U.S.C. 1951 .....3, 10, 12, 31
Travel Act, 18 U.S.C. 1952 3
18 U.S.C. § 1964(c) 37, 38, 46, 48
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.....39, 40, 47
Judiciary Act of 1789, 1 Stat. 73 38
Minn. Stat. § 609.27 (1967).....34
1917 N.Y. Laws, ch. 518 24
N.Y. Penal Law § 530 (1909).....26
N.Y. Penal Law § 850 (McKinney Supp. 1965) 24
Model Penal Code § 223.05.....27

TABLE OF AUTHORITIES—Continued

Page(s)

Model Penal Code of the State of New York § 584 (1865) 25
N.Y. Gen. Const. Law § 39 (1917)....19
N.Y. Penal Code §§ 850-857 (1944) 25, 26
N.Y. Penal Code § 1290 (1944) 25
N.Y. Penal Code § 2120 (1944) 25
Wis. Stat. § 943.30 (1965)....34

LEGISLATIVE MATERIALS

91 Cong. Rec. 11,900 (1945)....18
91 Cong. Rec. 11,906 (1945)....18
91 Cong. Rec. 11,910 (1945)....18
116 Cong. Rec. 35,346 (1970)....44
116 Cong. Rec. 35,347 (1970)....45
117 Cong. Rec. 46,386, 46,393 (1971)....45
118 Cong. Rec. 29,368-69, 29,379 (1972) 45
119 Cong. Rec. 10,317 (1973)....45

BOOKS, ARTICLES & TREATISES

BLACK'S LAW DICTIONARY (3d ed. 1933)....15
Sir William Blackstone, BLACKSTONE'S COMMENTARY ON THE LAW 73 (Bernard C. Gavitt ed., Wm. Hardcastle Brown 1941) (1892)....16
G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center* v. *Wollersheim*, 62 NOTRE DAME L. REV. 526 (1987)....44
G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 NOTRE DAME L. REV. 237 (1982)....41, 44
Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954) 18
E. Allan Farnsworth, CONTRACTS § 11.1 (2d ed. 1990)....16

TABLE OF AUTHORITIES—Continued

Page(s)

J.W. Harris, PROPERTY AND JUSTICE 5 (Oxford U. Press: 1996)....18
L. CORPUS JURIS (1930)....15
Wayne R. LaFave & Austin W. Scott, Jr., 2 SUBSTANTIVE CRIMINAL LAW (1986)....25
Lindgren, *The Elusive Distinction Between Bribery and Extorting from the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988)....21
C.B. MacPherson, *The Meaning of Property, in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS (C.B. MacPherson ed., 1978)....14
Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998)....14, 17
Modern Federal Instructions, Criminal, Matthew Bender & Co. (2001)....25
Restatement of the Law, Property, Introductory Note (1936)....15
William B. Stoebuck & Dale A. Whitman, THE LAW OF PROPERTY § 1.2 (3d ed. 2000)....16
U.S. Department of Justice, National Task Force on Violence Against Health Care Providers, *Report on Federal Efforts to Prevent and Prosecute Clinic Violence, 1998-2000, available at* http:// www.usdoj.gov. 31

TABLE OF ABBREVIATIONS

JA	Joint Appendix
OR Br.	Petitioner Operation Rescue's Brief
OR Pet.	Petitioner Operation Rescue's Petition for Writ of Certiorari
OR	Petitioner Operation Rescue
PX	Respondents' Exhibits at Trial (Plaintiffs' Exhibits)
R	Record Below
RA	Appendix to Respondents' Brief
Sch. Br.	Petitioner Scheidler's Brief
Sch. Pet.	Petitioner Scheidler's Petition for Writ of Certiorari
Sch.	Petitioner Joseph Scheidler et al.
SPA	Appendix to No. 01-1118 Petition for a Writ of Certiorari of Scheidler et al.
T	Trial Transcript in the District Court

STATEMENT

After this Court's decision in *NOW* v. *Scheidler*, 510 U.S. 249 (1994)("*NOW I*"), holding that the Racketeer Influenced and Corrupt Organizations Act (RICO) has no "economic motive" requirement, Respondents, the National Organization for Women (NOW), Delaware Women's Health Organization (DWHO), and Summit Women's Health Organization (SWHO) proceeded to a seven-week trial against Petitioners in March 1998. On April 20, 1998, a unanimous jury returned a detailed verdict, with four pages of special interrogatories, finding Petitioners responsible for operating their enterprise, the Pro-Life Action Network (PLAN), through a pattern of 121 RICO predicates, including 21 Hobbs Act violations and 25 state law extortion violations. The jury awarded DWHO and SWHO damages, which were trebled under 18 U.S.C. § 1964(c). After additional evidence on the need for injunctive relief, in July 1999 the trial court granted a nationwide injunction. On October 2, 2001, the United States Court of Appeals for the Seventh Circuit affirmed in every regard.[1] The injunction has not affected peaceful protests, but has brought an end to a lengthy campaign of threats and violence intended to shut down women's health facilities that offer abortion services.

The Proof at Trial

Respondents proved that PLAN's nationwide pattern of crimes included violent assaults and physical attacks on patients, doctors, clinic staff, and police, plus destruction of medical equipment, supplies, and other clinic property, committed for the purpose of obtaining control over the property of women's health centers and their customers. Petitioners' portrait of their enterprise as an organization operated only through non-violent sit-ins and blockades (*e.g.*, OR

[1] The Rule 60(b) motions OR mentions (Br. 3 n.3) were either withdrawn by Petitioners or denied as baseless, and such denial was affirmed on appeal. *See, e.g.*, SPA 30a; R1474.

Br. 2, 4, 7) bears no relation to the proof. Abundant evidence showed that PLAN members regularly assaulted clinic personnel and patients: they beat on their cars, hit and clawed them, choked them, threw them to the ground, shoved and elbowed them, and slammed them against buildings, even as they begged to be let go because they were being crushed.[2] SPA 4a; RA 27a-29a, 31a-34a, 36a-37a; JA 111-12; T 1551, 4824-26, 4829. It was common for PLAN to apply so much force to bodies pinned against buildings that glass doors and windows were damaged or cracked from the pressure. SPA 4a; T 1445, 4824-25; PX 3B, p. 3.

Patients seeking treatment for a variety of health problems were attacked by PLAN members to keep them from their appointments. RA 31a-32a, 35a-37a; T 1914-17. One fertility patient tried desperately to get through a blockade because she was ovulating and needed insemination that day, but PLAN members grabbed her and pulled her into their midst; even with police assistance, she was unable to get into the clinic. RA 31a. At a Los Angeles clinic, PLAN members grabbed the arms and legs of an ovarian surgery patient who was due to receive post-operative treatment there. When she continued to attempt to access medical services, PLAN members pulled her hair, struck her, and beat her with an anti-abortion sign until her sutures ruptured and she passed out. SPA 2a, 4a-5a; RA 35a-37a; T 1519-20, 1522.[3]

---

[2] Although Petitioners sometimes denied that their enterprise had members, they repeatedly referred to both PLAN's constituent organizations and the individuals who comprised them as "members," *e.g.*, RA 11a-12a; PX 237, p. 3, PX 801, p.18a.

[3] PLAN's crimes by force or violence proved at trial also included the following:

In Cherry Hill, New Jersey, PLAN members made human chains and violently pushed back clinic staff who were trying to keep a corridor open for their patients, causing property damage. T 4822-25; PX 1441. PLAN member grabbed the clinic administrator by the hair and threw her to the sidewalk. T 4824-26, 4829.

None of the 121 RICO predicate acts[4] found by the jury was a mere sit-in or blockade. SPA 126a, n.6; JA 145. At Petitioners' request, T 4488-90, one interrogatory, JA 145, Q6, asked the jury whether any predicate act was "based solely on blockades of clinic doors or sit-ins within the clinics, without more?" The jury answered, "No." JA 145.[5]

PLAN leaders repeatedly invaded the DWHO clinic; they destroyed medical equipment and medications, tore down cabinets, and chained themselves to operating tables; they threatened the administrator to induce her to leave her job. RA 23a-24a, 29a-30a; SPA 111a.

In Pensacola, they ransacked a clinic, destroyed medical equipment, attacked a staff member and a volunteer, slamming them against the wall and causing spinal damage to both women. RA 33a-35a, 43a-44a; T 1471-72, 4012-26.

In Wichita, after forcing a clinic to close for a week, PLAN members barricaded the entrances, surrounded and beat on patients' cars, and grabbed and bruised patients trying to pass through corridors made by federal marshals. RA 25a-28a; T 1088-89; PX 312, 413.

Similar assaults and otherwise violent conduct occurred in Atlanta, RA 37a-38a; T 1551-52; Milwaukee, SPA 111a; JA 111-12; T 1871-72, 1914; Lake Forest, Illinois, RA 44a; and elsewhere, SPA 5a, 110a; PX 513; T 1209-11; JA 113-27; RA 38a-40a, 45a.

[4] As OR points out (Br. 5 n.9), to satisfy RICO's pattern requirement Respondents introduced evidence of some 30 incidents of conduct by PLAN, giving rise to 121 violations in six categories. The predicate state and federal extortion acts overlapped because the elements were similar. Thus, most of the acts giving rise to state extortion violations also gave rise to violations of the Hobbs Act, 18 U.S.C. § 1951, or the Travel Act, 18 U.S.C. § 1952, or both; and each of the Hobbs Act violations was also the basis for a finding as to state extortion laws, *see* JA 144 Q4(d).

[5] Although the word "blockade" may imply a forcible obstruction, the parties recognized that it was possible to conduct a blockade without force or violence. T 4490-94. For example, setting a sawhorse in front of a doorway might create a blockade, but no one would argue that it would involve force, violence, or the wrongful use of fear, as required for a Hobbs Act violation. Similarly, Respondents agreed that if protesters sat or stood peacefully and passively in front of a door, without using acts or threats of force to prevent staff or patients from passing through, this would not be the wrongful use of force, violence, or fear. T 4493.

PLAN's chosen tactic was a form of forcible invasions and blockades that PLAN aptly called "blitzes," SPA 135a; RA 13a; PX 801, p. 13; T 1018, and, later, "rescues," which entailed whatever force was necessary to induce clinics to close and patients to give up their contracts for medical services. SPA 2a, 5a, 111a, 134a; JA 83; RA 13a, 42a-44a; PX 628, p. 14; T 980-01, 1006-07, 1970, 3660-61. PLAN Director Randall Terry's public definition of "rescue" made clear force was authorized:[6] "Rescue is making [a clinic] inaccessible . . . by placing our bodies around it, in it, somewhere on the premise [sic] so that [women] cannot get in . . . . Or it could include . . . our bodies and our cars, our bodies and Kryptonite locks, [or] our bodies and chains." JA 83. PLAN leaders told clinics to "close or be closed" by their "blitzes." SPA 115a; RA 17a, 19a-20a. Each of the attacks presented to the jury involved the use or threat of force or violence. T 5005; JA 145.[7] Patients with the courage and stamina to make it through PLAN's "blitzes" were typically left shaking and crying from the ordeal. T 1872-73.

PLAN was formed specifically to target medical providers across the nation, PX 140, and its leaders publicly endorsed the use of force, T 1910, and even violence, which PLAN founder and Director Scheidler declared permissible. PX 628, p.14. Scheidler praised those who violently invaded the Pensacola Ladies' Center and brutally attacked its staff for the "good job" they did terrorizing the clinic and its patients. RA 15a, 34a-35a; *see also* JA 84. He also stated that he did not consider arson and bombings to be "violence." JA 86.

[6] Terry, OR's first National Director, T 1823-24, settled with Respondents before trial and agreed to permanent injunctive relief. JA 79-82.

[7] Petitioners used the phrase "non-violent direct action" as code for their "blitzes," defining it to include forcibly blocking doors and operating rooms, SPA 2a, 110a-113a; RA 17a, 19a-20a, 38a-40a; T 1019, 1972, and even arson and bombing, JA 85-86; RA 41a. The district court noted Petitioners' frequent use of language with double meanings to engender fear of bodily harm. T 4531-32. Citing the "necessity defense," PLAN claimed that even its most violent crimes were lawful.. PX 712, p. 5, 713. Declaring legislative change too slow, RA 9a; PX 23B, PLAN's leaders vowed to stop abortions "in every way possible." T 3933. They publicly criticized those who urged true non-violence. *See* PX 905, p. 2 (Scheidler belittled Cardinal Bernadin's approach as "weak. It shows lack of leadership. . . ."). They called National Right-to-Life leaders "wimps" and "lily-pads for life." T 1511-12, 3936, 4144; PX 801, p. 13.

Over the fourteen years of its operation, PLAN mobilized anywhere from a few dozen to thousands of members from many states to carry out its "blitzes" in cities across the country.[8] JA 118; PX 17A, 1084; T 1374.[9] At annual conventions, PLAN developed and promoted innovative tactics for forcing clinics to close, PX 237, p. 5, including various types of "lock and blocks," using tools such as Kryptonite locks, chains, cement blocks, pipes, and even old cars. PX 148; RA 24a, 38a-39a.[10] PLAN members would dismantle the equipment only when the clinics consented to

[8] Petitioners' *amicus* Center for Individual Rights (Br. 16, 18) errs in suggesting that PLAN's violence was intrastate and non-economic. It was neither. NOW sued on behalf of patients nationwide along with two full-service clinics whose interstate business operations had been repeatedly disrupted by PLAN. T 647-48, 653; RA 23a-24a. Both Respondent clinics suffered substantial economic injury, affecting their interstate purchases of supplies and services and impairing their ability to provide medical care to both in-state and out-of-state patients. T 1369, 676-88. The jury expressly found that PLAN's predicate acts affected interstate commerce, JA 145, Q 8, and the trial court found that Petitioners "committed repeated . . . acts and threats of violence to persons and property across the United States," SPA 133a.

[9] In addition to the crimes detailed above, PLAN orchestrated attacks in Chicago; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; New York City; Fargo, North Dakota; San Antonio; and other locations. SPA 110a, 116a; T 1078.

[10] In Fargo, PLAN members invaded the clinic and, using metal pipes and metal boxes, attached themselves to the structure so they could be removed only with special metal-cutting tools. RA 24a. They vowed to make North Dakota, and later Vermont, "abortion-free" states. JA 116;

the equipment only when the clinics consented to close rather than face further violence. PX 513. On "National Days of Blitzes," PX 435A (10/19/85 entry, Tape 32), later called "National Days of Rescue," PX 25A, PLAN targeted dozens of locations across the country simultaneously. RA 5a (46 cities in April 1989). The time and the precise targets of PLAN's attacks were usually a closely guarded secret. T 1079, 1375, 4815. PLAN's *blitzkrieg* tactics were widely feared by abortion providers and their clients, and they were explicitly designed to cause such fear. SPA 114a-115a, n.2, 135a; RA 21a; T 1515-19, 977, 1871, 1916, 1918; PX 513, 640.

PLAN coupled its attacks with demands for closure and threats of more "blitzes." Many clinics surrendered and closed or curtailed operations at least for a time, as Petitioner Scheidler boasted: "[W]e got four abortion facilities to quit doing abortions one day. We just told them to quit. And if you don't we'll come in and shut you down." PX 1142; *see also* RA 17a-20a; PX 661, p. 2, PX 17A ("It is our hope that the clinic operators will willingly close for the day. If not, they will have to face the reality of dedicated prolifers who will intercede to [stop abortions].")[11] Clinics that did not give in to PLAN's threats incurred costs for repairs and for security to protect patients and staff. Patients bore the burden of added hotel and transportation needs as well as emergency medical care. T 768-76, 1523, 1920.

Since PLAN's strategy was to overwhelm local law enforcement and close clinics without legal consequences, SPA

PX 608, p. 2. (They made the same threat to DWHO. T 683; PX 435A (2/27/87 entry).)

[11] "We're going to have a virtual army out there," Scheidler vowed. "I'm not talking about the moderate. I'm talking about the hard core activists for whom the abortion clinic door means nothing. I would strongly suggest that [abortion provider Dr. Warren Hern] stay up at his house in the mo[u]ntains, or else take a vacation. If [Dr. Hern] sees it as a threat, that's fine." RA 21a.

114a; T 3938, 4815-16; RA 8a. PLAN leaders targeted cities where they thought law enforcement resources were weak; alternatively, they amassed so many "blitzers" that even well-staffed police forces could not stop them, *e.g.*, RA 26a-27a. Clinics that obtained territorially limited injunctions from local courts fared little better than those with none; PLAN leaders tore up court orders and continued with their "blitzes." PX 468, 1098; T 1068-69. As the trial court found, geographically limited injunctions had failed to prevent PLAN's crimes; PLAN would either ignore the injunctions altogether or move to new jurisdictions. SPA 134a-135a.

It was not just abortion patients who were made to accede to PLAN's demands. Respondent clinics offered a broad range of services, including gynecological treatment and adoption assistance, and PLAN targeted every woman trying to enter, including those with appointments for cancer screening, fertility treatment, and annual physicals, as well as those with appointments to purchase contraceptive products and counseling. SPA 111a-12a; PX 108; T 1914, 1368, 2552-54.[12] PLAN's goal was to control the rights of even non-abortion patients to spend their money at clinics that offered abortions because, as Scheidler explained, "we don't want them to go in for any service . . . ; it just keeps the abortionists in business." JA 128-29.

The Accommodations for Petitioners' First Amendment Rights

None of the predicate crimes was based on what OR (Br. 3) and *amicus* Life Legal Defense Foundation (Br. 3) call "guilt by association," or on mere attendance at PLAN events, as *amici* Seamless Garment, *et al.*, also suggest (Br.

[12] Patients were not mere "putative" or "prospective" patients, as Scheidler claims (Br. 3, 13, 17). Each had an appointment for a specific service at a specific time, and most had ongoing relationships with their medical providers. *E.g.*, RA 31a-32a, 35a-37a; T 655-58; JA 126-27.

12). Petitioners were all high-ranking PLAN leaders who organized and participated in the pattern of crimes that included 21 Hobbs Act violations. SPA 19a, 113a-116a. Before holding a Petitioner liable, the jury was required, in addition to finding that each Petitioner operated or managed the enterprise through a pattern of predicate crimes, to find that each crime on which liability was based was committed "knowingly, willfully and wrongfully," with each Petitioner's specific intent and with the authorization or ratification of their enterprise. JA 136, 140.

The trial judge commented that the proof that Petitioners authorized or ratified the crimes was voluminous enough "to fill up this courtroom." T 4563-64. Thus, crimes committed unintentionally or without PLAN's approval could not, and did not, trigger liability. Petitioners repeatedly reminded the jury of this requirement, *e.g.*, T 5045, 5050, and Petitioners do not challenge the adequacy of the proof even under these strict standards. *See* Sch. Pet., OR Pet. In addition, the trial judge required that crimes committed by any alleged PLAN member be closely tied to Petitioners; there was thus no risk that violence unauthorized by PLAN might be imputed to Petitioners. T 10-90 (2/27/98).

Contrary to OR's contentions (Br. 2), Respondents did not challenge Petitioners' right to engage in protected speech, even when it was unwelcome, uninvited, insulting, or outrageous. To the contrary, Respondents and the trial court reminded the jury that even offensive speech received First Amendment protection.[13] Thus, the verdict was not based on Petitioners' lawful conduct or anti-abortion message.

---

[13] T 5118; JA 141. Respondents joined Petitioners in asking that the jury be instructed: "Nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafleting and participating in the legislative process are activities protected by the First Amendment of the United States Constitution." JA 131; *see also* R1101, Final Pretrial Order, Agreed Instruction #18. Damages had to flow exclusively from the criminal acts, not from constitutionally protected speech that may have accompanied it. JA 139. Petitioners' counsel reminded the jury: any "fear . . . in this case must be the result of extortionate activities . . . [and] based on the extortionate activities and nothing less." Respondents' counsel reminded the jury not to include any protected conduct in the predicate acts. T 5118. Contrary to the assertions of *amici* Seamless Garment, *et al.* (Br. 6-7), Respondents did not argue that Scheidler's "choose life" card was a threat; it was introduced merely to place him at the scene. T 1468.

The evidence established far more than mere "interference" with the rights of clinics and patients. The jury was instructed that each predicate act had to be based on the "wrongful" use of force, violence or fear, and that constitutionally protected and other lawful conduct was excluded. *See, e.g.*, JA 131, 141. The court further instructed the jury that any fear flowing from Petitioners' wrongful conduct must have been reasonable. JA 136; *e.g.*, SPA 112a-13a; T 1375-76, 1871, 1866. Because the Hobbs Act requires the obtaining of property with the victim's consent, Respondents relied only on wrongful acts designed to make Respondents cede control of their property to Petitioners, not on crimes that entailed no demand to surrender property. JA 136; SPA 151a.

Proceedings on Remedy

After the jury rendered its unanimous verdict, the district court took additional evidence on whether an injunction was necessary. Despite Petitioners' contention that they had abandoned their wrongful conduct after enactment of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), the trial court found that PLAN's pattern of crimes had continued unabated. Even when FACE injunctions had been issued against PLAN members, they continued to cross state lines to promote and carry out their crimes in new jurisdictions. SPA 134a. The district court therefore concluded that an injunction was necessary. SPA 13

The Seventh Circuit affirmed. Its decision expressed hope that the injunction would end the violence and promote peaceful discourse:

> [P]erhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy—on either side—away from the use of threats and violence and back to 'all the peaceful means for gaining access to the mind,' the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

SPA 25a. To a significant extent, that hope has been fulfilled; the injunction ended PLAN's reign of terror, and in the ensuing three years, no enforcement action has been necessary. It has not put an end to lawful protest.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that Petitioners committed 21 violations of the Hobbs Act, which defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." 18 U.S.C. § 1951(b)(2). Petitioners directed their conduct at the "property" of Respondent clinics because the plain meaning of the word "property" includes the tangible physical assets of a clinic as well as the intangible right of the clinic owner to use, control, and direct the use and disposition of those assets. Petitioners directed extortion against the property of clinic patients by preventing them from obtaining the fruits of their contracts for medical services and from spending their money at health centers of their choice. Petitioners wrongfully attempted to obtain property by seeking, through acts and threats of force and violence against the clinics and their patients, and absent any claim of right, to arrogate to themselves the control over such

property. Petitioners' threats caused Respondents to consent to the extortionate acquisition of their property, for at various times clinics and their patients capitulated to their demands and gave up their right to exclusive control over their assets, rather than face extreme consequences.

II. Petitioners also committed 25 violations of state extortion laws. Even apart from the Hobbs Act violations, the judgment should be affirmed on the basis of these RICO predicates, which are so numerous, related, and continuing as to constitute overwhelming evidence of a RICO pattern.

III. The court of appeals also correctly held that district courts may issue injunctions in private RICO suits upon proof that the RICO violation is likely to continue, where such issuance is in the public interest. The express terms and structure of the statute make this clear. Section 1964(a) provides that district courts may order "appropriate" remedies "to prevent and restrain violations" and to "impos[e] reasonable restrictions on future activities." Section 1964(c) confers standing on private parties who are injured in their business or property by a RICO violation. Nothing in § 1964(a) or in any other subsection of § 1964 precludes private parties from seeking injunctions, nor limits the availability of injunctions to the government. This plain reading is reinforced by other aspects of RICO's text and the presumption that the federal courts have power to issue injunctions unless Congress by "clearest command" takes that power away. *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979); no such clear command—or even the barest hint of any such intention—can be discerned in RICO or its legislative history.

IV. Petitioners' acts were not peaceful, constitutionally protected protests, but regularly included assaultive and violent conduct designed to create and exploit the reasonable fears of medical providers and patients. The judgment thus raises no First Amendment concerns.

ARGUMENT

I. PETITIONERS COMMITTED HOBBS ACT EXTORTION BY WRONGFULLY USING FORCE AND VIOLENCE TO MAKE RESPONDENTS SURRENDER THEIR PROPERTY TO PETITIONERS.

Petitioners take the ordinary words of the Hobbs Act—"property," "obtai[n]," "consent," and "wrongful"—which have well-understood meanings developed over centuries of jurisprudence, and give each a cramped, unnatural construction. The result of Petitioners' linguistic legerdemain is a statute too circumscribed to achieve its obvious purposes and one that would be unrecognizable to its drafters.

Petitioners' conduct was extortion pure and simple. The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." 18 U.S.C. § 1951(b)(2). The object of Petitioners' extortion was to override the clinics' lawful decisions about use of their business assets, including buildings, equipment, and personnel, and the patients' rights to the benefits of their fee-for-service contracts with medical providers. Petitioners attempted to obtain control over these valuable assets by actual or threatened "blitzes," which regularly included physical assaults and batteries on doctors, staff, and patients, and such other force as was necessary, coupled with express or implied demands that medical center operators shut down their businesses. Petitioners both obtained and attempted to obtain Respondents' property, and their wrongful acts fell comfortably within the Hobbs Act's reach.

Petitioners' conduct is just the sort that the Hobbs Act Congress sought to make unlawful. It is indistinguishable from crimes carried out by terrorist groups—for example, to induce banks to stop making loans to certain nations by threats of bombings; to induce investors to withdraw funds from disfavored global businesses by threats of kidnapping;

to induce retail establishments not to sell merchandise made by certain laborers by threats of violence to their premises or employees; or to induce patrons to refrain from buying, and stores to refrain from selling, fur coats by threatening to throw paint on customers. In each case, the extortionist uses an act or threat of force to secure the owner's consent not to use its property in a way the extortionist disfavors. The Hobbs Act's plain language and historic origins show that Congress intended to proscribe such dangerous and destructive conduct.

A. Petitioners Sought or Secured Control Over Respondents' "Property."

As this Court recognized over 40 years ago, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). One of the Act's deliberately inclusive terms is "property." Property includes control over the use and disposition of one's resources, including business assets, money, and valid contracts.

This unremarkable principle is firmly grounded in centuries of legal thought and jurisprudence. Petitioners try to avoid this fact by arguing that interests like the "right to good government," state licensing powers, and liberty are not property, *see* OR Br. 40-41; Sch. Br. 16—propositions Respondents do not dispute. But nowhere do Petitioners offer a coherent theory of what property *does* comprise. They offer instead the unsupportable proposition that property may consist only of tangible things, perhaps a select few intangibles, or "property" that somehow can be distinguished from property "rights." Property, in their view, does not include the right to determine the use to which such assets are put. There is no merit to these selective limitations.

1. "Property" historically has encompassed the right lawfully to control one's assets.

Hobbs Act property is not limited to tangible items and some limited intangible assets like "stock or copyrights," as OR (Br. 39) argues. This crabbed view is flatly contradicted by the long-settled meaning of property. The very year the Act was being debated, this Court made clear that the construction OR advocates uses property "in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945). When "employed in a more accurate sense," property is defined as "the group of rights inhering in the citizen's relation to the physical thing, as the right to *possess*, *use* and *dispose of* it." *Id.* (emphasis added); *see also Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 169-70 (1998) (property is "the group of rights which the so-called owner exercises in his dominion of the physical thing") (internal quotation marks and citation omitted).

Scheidler erroneously attempts to distinguish between "property" and "property rights" (Br. 13). But this Court has made clear that the legal term "property" refers to a set of *rights*, not just *things*. *See General Motors*, 323 U.S. at 377-78, 380. This understanding was well-established long before the Hobbs Act.[14] Authorities contemporaneous with the Act's passage make clear that property is a set of rights in anything of value—whether tangible or intangible—

[14] "[T]here is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources." Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 732 (1998). "As soon as any society, by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right . . . in the sense of an enforceable claim to some use or benefit of something." C.B. MacPherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 3 (C.B. MacPherson ed., 1978).

protected by law.[15] Property does not include mere expectancies or privileges unprotected by law, nor rights that lack an economic element.[16] Property does, in contrast, include

[15] *See, e.g.*, Restatement of the Law, Property, Introductory Note (1936) ("property," as a set of "legal relations among persons with respect to a thing," is subdivided into rights, privileges, powers, and immunities, all of which constitute property); BLACK'S LAW DICTIONARY 1446 (3d ed. 1933) (property is the "aggregate of rights protected by the government," including "every species of valuable right and interest"); L. CORPUS JURIS 732 (1930) ("there can be no conception of property aside from its control and use").

[16] *See, e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) ("ethereal" rights not property); *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (right to good government); *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101-02 (2d Cir. 1990) (city officials' response to disturbances); *People* v. *Learman*, 28 N.Y.S.2d 360 (N.Y. App. Div. 1941) (driver's license, which is a revocable privilege); *see also Cleveland* v. *United States*, 531 U.S. 12 (2000) (state's regulatory power over licensing does not make it property owner of licenses); *cf. Carey* v. *Piphus*, 435 U.S. 247, 263 (1978) (constitutional rights lack inherent monetary value).

Petitioners wrongly suggest that the issue in this case is not property rights, but the right to abortion. *See* OR Br. 39-40, Sch. Br. 13. But the jury was specifically instructed that a "wom[a]n's right to obtain an abortion is not at issue in this lawsuit." JA 131. Scheidler (Br. 2) erroneously implies that the Seventh Circuit held that the Hobbs Act protects "liberty" rights; but the court was referring to *property* rights, as his own citation shows. SPA 28a-29a. Furthermore, when a constitutional liberty coincides with a property right, it is no less protected as property. *E.g.*, *State* v. *Cadigan*, 50 A. 1079, 1081 (Vt. 1901) (right to labor and transact business involves *both* liberty *and* property rights). Thus, newspapers have both property rights to publish editorials and First Amendment rights to do the same. Likewise here, some—but far from all—of the women seeking medical services were exercising a constitutional right to abortion, which in no way detracts from the fact that their contracts to exchange money for medical services are property. Where the constitutional right to abortion and these property rights coincided, any reference to the women's contractual rights to medical services as "constitutional" was simply surplusage.

contracts and rights created by contracts.[17] "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917).

The constellation of rights that comprise property is often analogized to a "bundle of sticks."[18] At the center of the bundle, as Blackstone taught centuries ago, are the rights to exclusive control—the rights to "the free use, enjoyment and disposal by a man of all his acquisitions, without any control or diminution, save only by the laws of the land." Sir William Blackstone, BLACKSTONE'S COMMENTARY ON THE LAW 73 (Bernard C. Gavitt ed., Wm. Hardcastle Brown 1941) (1892).

This Court has repeatedly embraced this foundational concept that dominion over the use and disposition of a thing is the essence of "property." Thus, the Court has held that the exclusive "right to decide how to use" confidential busi-

---

[17] *See, e.g.*, E. Allan Farnsworth, CONTRACTS § 11.1 (2d ed. 1990) ("a contract is ... a type of intangible property"); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (patients had a "property interest in entering into a contractual relationship" with medical clinic); *cf. Leonard Duckworth, Inc.* v. *Michael Field & Co.*, 516 F.2d 952, 955 (5th Cir. 1975) (in tortious interference context, "the common law has long held that the reasonable expectancy of a prospective contract is a property right"); *Morse* v. *Swank, Inc.*, 459 F. Supp. 660, 667 (S.D.N.Y. 1978) (same); *United States* v. *Rastelli*, 870 F.2d 822, 831 (2d Cir. 1989) (employees' rights created by contract was property under mail fraud statute). That contracts are generally regarded as a form of property was well-settled at the time of Hobbs Act enactment. *See, e.g.*, *Wilkinson* v. *Powe*, 1 N.W.2d 539, 543 (Mich. 1942); *Chitwood* v. *McMillan*, 1 S.E.2d 162, 163 (S.C. 1939); *Oswego Falls Pulp & Paper Co.* v. *Stecher Lithograph Co.*, 215 N.Y. 98, 102 (1915); *Gillespie* v. *People*, 188 Ill. 176, 183-84 (1900).

[18] *United States* v. *Craft*, 122 S. Ct. 1414, 1420 (2002) (citing B. Cardozo, PARADOXES OF LEGAL SCIENCE 129 (1928)); *see also* William B. Stoebuck & Dale A. Whitman, THE LAW OF PROPERTY § 1.2 (3d ed. 2000).

ness information, while intangible, is "property." *Carpenter* v. *United States*, 484 U.S. 19, 25-26 (1987).[19] Only last Term, the Court made clear that control over assets is property. *United States* v. *Craft* considered the government's power to attach an interest in a tenancy in the entirety for tax lien purposes, which it could do only if the interest was "property" or "rights to property." The Court held that the taxpayer's rights to use the tenancy, derive income from it, exclude others, and alienate his interest were property because they "gave him a substantial degree of control over the entireties property." 122 S. Ct. at 1423. Similarly, in *Drye* v. *United States*, 528 U.S. 49, 56, 61 (1999), citing authorities going back to 1932, the Court unanimously held that property covers "every species of right" protected by law and having an "exchangeable value," including the right "to exercise dominion over" an inheritance. *See also McNally* v. *United States*, 483 U.S. 350, 360 (1987) (for mail fraud, property includes "control over how ... money was spent").[20] Thus, it was settled law when the Hobbs Act was

---

[19] The right to exclude is central to property, in large part because it determines the owner's right to control the use to which a thing is put. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979). "The right to exclude leads directly to [one's] right to dictate the uses of" a particular subject of property, "because no one else will be in a position to interfere with the particular uses designated" by the holder of the right. Merrill, *supra*, 77 NEB. L. REV. at 741; *see also College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-74 (1999) ("property" is what the owner can exclude others from using; contract law confers private rights, which are rights of exclusion). Although the Court in *Florida Prepaid* rejected the notion that a business has a constitutionally protected right to be free from false advertising or generally "to be secure," it in no way overruled decisions protecting as property one's exclusive control over business assets. *See id.* at 675 (business assets, including goodwill, "unquestionably are property").

[20] The fee-for-service relationship between the clinics and patients easily satisfies this definition, and the fact that some of the clinics were non-profit businesses does not suggest they lack property rights. *See, e.g.*, *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 515 (1979).

passed that in its normal and accepted legal use "[b]y property we mean an exclusive right to control an economic good." Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 360 (1954).

2. The Hobbs Act's origins show property includes the right to control both tangible and intangible assets.

The Hobbs Act debates show that Congress sought to punish wrongful threats and force designed to obtain control over another's assets. Thus, one congressman expressed his understanding that the Act would criminalize the conduct of "night-riders," who destroyed the tobacco crop of Kentucky farmers, burned their farm property, and intimidated and killed innocent people, all to force farmers to join a trade cartel. *See* 91 Cong. Rec. 11,906 (remarks of Cong. Robsion) (1945); *Tandy* v. *City of Hopkinsville*, 169 S.W. 703, 703-05 (Ky. 1914). That extortion of the right to control the use of business property is indistinguishable from the extortion here.

The Act's legislative history shows that Congress intended to adopt the common law understanding that "property" includes the intangible right to control the lawful use and disposition of one's assets. It is clear that Congress relied on New York extortion law in drafting an Act consistent with state law. *See* 91 Cong. Rec. 11,900, 11,906, 11,910.

Drye also noted that, contrary to Scheidler's contention (Br. 14), "transferability" has not been held essential to property. 528 U.S. at 60 n.7; *see also* J.W. Harris, PROPERTY AND JUSTICE 5 (Oxford U. Press: 1996) ("[t]ransmissibility is only a necessary feature of an ownership interest in the case of money"). In any event, Scheidler's argument is unavailing because the right to control an asset (which is the property sought to be obtained here) may be transferred. *See, e.g., United States* v. *Nardello*, 393 U.S. 286, 295 n.13 (1969) (organized crime uses extortion to "obtain control of labor unions"); *Perez* v. *United States*, 402 U.S. 146, 156 (1971) (loan sharking is used to "obtain[] control of legitimate businesses"); U.S. Br. 26 & n.14 and cases cited therein.

When the Hobbs Act was being debated, the great weight of state extortion law, including New York's, defined property to include intangibles.[21] New York's highest court had expressly endorsed Blackstone's view that "property consists in the free *use, enjoyment, and disposal* of all the owner's acquisitions, without any control or diminution, save only by the laws of the land," and that the state extortion statute used the term "in its broad and unrestricted sense," including both tangible and intangible property. *People* v. *Barondess*, 31 N.E. 240, 242 (N.Y. 1892); *see also People ex. rel. Short* v. *Warden*, 130 N.Y.S. 698, 700 (App. Div. 1911) (disapproving a lower court's narrow construction of property), *aff'd*, 99 N.E. 1116 (N.Y. 1912). Indeed, property had long been defined under New York law as encompassing "everything . . . which may be the subject of ownership," including not only money and chattels, but also "things in action" and written instruments involving rights in property. N.Y. Gen. Const. Law § 39 (1917) ("Property, Personal").[22]

That New York law prohibits (and prohibited) the use of threats to compel the victim to give up control over a business was powerfully affirmed by the New York Court of Appeals in *People* v. *Spatarella*, 34 N.Y.2d 157 (1974). There, the defendant threatened physical violence unless the victim ceased providing services to a particular customer, but argued that his conduct was not extortion because the business relationship was not amenable to a physical "taking" from the victim and "delivery" to the extortionist. *Id.* at 162. Relying heavily on New York cases pre-dating the Hobbs Act,

---

[21] Pre-Hobbs New York case law primarily addressed the meaning of property in the context of threats to injure property under New York Penal Code § 851. As explained at pp. 19-20, *infra*, it has the same meaning there as in the context of "obtaining property."

[22] This inclusive definition applied to all statutes in which no contrary meaning was intended, *see In re Bronson*, 150 N.Y. 1, 5 (1896), and there is no reason to believe a narrower meaning was intended for extortion.

the court reasoned that the extortion was complete when the victim had been "deprived of" the choice whether to provide a service to a particular customer, regardless of whether that business literally could be taken or the customer delivered to defendant. *See id.* at 161-63.[23]

New York's pre-Hobbs Act extortion law explicitly protected the intangible right to operate a lawful business.[24] Prior to the Hobbs Act's passage, the Supreme Court of Cali-

[23] Petitioners seek to escape *Spatarella*'s holding by relying on a New York trial court decision, *People* v. *Squillante*, 185 N.Y.S.2d 357 (Sup. Ct. 1959), which opined that the word "property" might mean different things in two clauses within the extortion statute, and, therefore, that the class of property injured by an extortionist might be different from the class of property which the extortionist obtains. *See* OR Br. 34; Sch. Br. 23 n.16, 25, 27. No reported New York case has followed *Squillante*, and its tortured reasoning was squarely rejected by New York's highest court in *Spatarella*. *Spatarella* noted that, while the pre-Hobbs New York cases on which it relied had construed the term "property" to define the kind of property that can be threatened, and consistently held the term to include intangible rights, "[w]e are not disposed to construe the term differently in defining the property which can be demanded." 34 N.Y.2d at 162. *See also People ex rel. Short*, 130 N.Y.S. at 700 (discussing both the "threats" and "obtaining" clauses and finding that the lower court's construction of "'property' as used in *these sections* is too narrow" (emphasis added)). Though both *Squillante* and *Spatarella* postdate the Hobbs Act and so could not have informed the Hobbs Act Congress' intent, *see Evans* v. *United States*, 504 U.S. 255, 267 n.18 (1992), *Spatarella* explicitly aligns New York law with pre-Hobbs Act New York rulings that "property" within the extortion statute is "'intended to embrace every species of valuable right and interest,'" 34 N.Y.2d at 162, including business and business relationships, *see id.* (quoting *People ex rel. Short* v. *Warden*, 145 App. Div. 861, 863 (N.Y. App. Div. 1911)).

[24] *See, e.g., People* v. *Sheridan*, 174 N.Y.S. 327, 329 (App. Div. 1919) (threat to deprive victim of use of elevator was injury to property); *People* v. *Weinseimer*, 102 N.Y.S. 579, 587 (App. Div.) (injury to business is injury to property), *aff'd*, 83 N.E. 1129 (N.Y. 1907); *People* v. *Hughes*, 32 N.E. 1105, 1107-08 (N.Y. 1893) (characterizing intangible business assets as property); *Barondess*, 31 N.E. at 241-42 (upholding extortion conviction because "a loss resulting from the suspension or interruption of the business would necessarily be an injury to property").

fornia took the same view. Under the law of California, one of the first states to enact a statute based on the Field Penal Code, *see* Lindgren, *The Elusive Distinction Between Bribery and Extorting from the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 892, n.472 (1988), the state's high court held that the intangible right to pursue an appeal is property, and that using threats to force abandonment of that right is extortion. *See People* v. *Cadman*, 57 Cal. 562 (1881). Hobbs Act property unquestionably includes the right to control both tangible and intangible resources, including one's money, valid contracts, and other business assets. Scheidler's suggestion (Br. 18-24) that this view is an ahistoric expansion of the nature of property post-dating the Hobbs Act is plainly wrong.

The common-law concept of property as control over the use of valuable assets was the background against which Congress passed the Hobbs Act. "'[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Evans*, 504 U.S. at 259-60 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).

Since the Act's passage, the federal courts consistently have held that "property" under the Act must be read inclusively, and consistently have rejected narrow, artificial readings like those Petitioners offer. Just seven years after the Act took effect, the Eighth Circuit held that a "victim's rights under its construction contract" were Hobbs Act property. *Bianchi* v. *United States*, 219 F.2d 182, 189 (8th Cir. 1955). "The definition of property in the Act is not restricted to any particular type of property," the court observed; the Act's protective purpose mandates a definition that includes intangible property rights. *Id.* The following year, in *United States* v. *Green*, 350 U.S. 415, 417 (1956), this Court upheld

a conviction under the Act for the use of force to control an aspect of the victim's business: the number of employees it hired. And more than thirty years ago, the Second Circuit similarly held that property "is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered to be a source or element of wealth." *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) (citations omitted).

The courts of appeals uniformly have rejected suggestions that the Act does not reach attempts to gain control of valuable assets, including the business decisions of another. Force and threats designed to change business decisions form the core of what is commonly regarded as extortion. The *Tropiano* defendant, for example, used threats of violence to deter a refuse collector from soliciting business from specific customers. The Second Circuit affirmed the conviction, holding that control over business decisions is Hobbs Act property:

> [The victim] had a right to solicit business from anyone in any area without any territorial restrictions by the appellants. . . . The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right.

418 F.2d at 1076. For over three decades the federal courts uniformly have followed *Tropiano* in holding that the right to conduct a lawful business without consenting to restrictions demanded by an extortionist falls squarely within the Hobbs Act.[25]

---

[25] *See, e.g.*, *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985); *United States* v. *Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973); *United States* v. *Overton*, 470 F.2d 761, 764 (2d Cir. 1972).

The holdings and reasoning of *Tropiano* and its progeny are fully applicable to extortion of medical services providers and the patients with whom they have economic relationships, as every lower court to consider the issue has held.[26] Medical centers are businesses, and the use of force or threats to make them close or restrict their services is extortion, as it would be if directed against any other lawful business. The women's exclusive right to spend their money on lawful medical services and to enter into fee-for-services contracts with businesses of their choice is also property over which Petitioners may not seek wrongfully to exercise control. Petitioners' explicit object was to "shut down the clinics," *NOW I*, 510 U.S. at 253, and to force patients to refrain from patronizing any business that offered abortions, JA 128-29. Petitioners' "blitzes" targeted each patient directly, as well as the essential elements the clinics required to operate their businesses: a building in which to function, T 1441-46; equipment and supplies with which to perform medical procedures, RA 23a-24a, 29a-30a, 34a-35a; T 1470-73; personnel to deliver those services, and customers to purchase those services, RA 31a-37a. This conduct, designed to drive the clinics out of business, is garden-variety extortion.[27]

---

[26] *See, e.g.*, *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *McMonagle*, 868 F.2d at 1350; *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coalition of Life Activists*, 945 F. Supp. 1355, 1381 (D. Or. 1996), *aff'd in part on other grounds*, 290 F.3d 1058 (9th Cir. 2002) (*en banc*); *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983); *see also Libertad* v. *Welch*, 53 F.3d 428, 437 n.4, 438 & n.6 (1st Cir. 1995) (patients have RICO claims for lost wages, travel expenses, or other specific damage) (dicta); *Town of W. Hartford* v. *Operation Rescue*, 915 F.2d 92, 101-02 (2d Cir. 1990) (dicta).

[27] It is hard to imagine how extortion of a business could be committed *except* through its employees or patrons, so each act of extortion directed at a clinic staff member or patient was extortion of the clinics.

B. By Seeking To Get Control of the Use and Disposition of Respondents' Property, Petitioners Sought To "Obtain" That Property.

Because control over the use and disposition of an asset is property, a defendant "obtains" property under the Hobbs Act by acquiring such control.[28] As the jury, district court, and Seventh Circuit correctly determined, Petitioners attempted to obtain property by using threats, force, and violence to make Respondents abandon lawful uses to which they customarily put their property. Respondents do not contend (as Petitioners say, OR Br. 29-32; Sch. Br. 12, 15-16) that Petitioners "obtained" property by causing physical damage to it. Instead, because the property sought was dominion and control over the ongoing use of assets, PLAN's direct attacks on clinic assets were just one means used to

---

See, e.g., *McMonagle*, 868 F.2d at 1350 n.8 (illegal conduct against "employees and patients was directly related to Defendants' goal to shut down the clinic"); RA 29a-30a. Indeed, for this reason, the pre-Hobbs New York extortion statute specified that the offense included "obtaining the property of a corporation from an officer, agent or employee thereof." Penal Law of 1909, § 850, as amended, 1917 N.Y. Laws, ch. 518, codified in N.Y. Penal Law § 850 (McKinney Supp. 1965) (cited in *Evans*, 504 U.S. at 263 n.8). Because the rights of clinics, their employees, and their patients are analytically inseparable, a finding of extortion against the patients and employees necessarily constitutes a finding of extortion against the clinics.

Even apart from the extortion of the patients, however, it is clear that the verdict for the clinics rested on a pattern of extortion against the clinics themselves, for the jury specifically determined that both DWHO and SWHO had suffered damages proximately caused by at least two extortionate acts directed against them. JA 145-46 Q9, 10. *See, e.g. Griffin* v. *United States*, 502 U.S. 46, 55-58 (1991). Thus, the verdict plainly rested on an independent and permissible ground as to which multiple extortionate acts were found.

[28] "Since the Hobbs Act concept of property is broad, the Act's requirement that property be obtain[ed] is given a similarly broad construction." *Arena*, 180 F.3d at 394 (internal quotation marks omitted).

obtain the clinics' consent to Petitioners' exercise of control over the use of *all* clinic assets.[29]

Just as Petitioners advance an implausibly narrow definition of property, they urge a similarly cramped construction of "obtaining," arguing that the *obtaining* of property under the Hobbs Act requires a physical *taking* and carrying away, as robbery and larceny do. OR Br. 33-35; Sch. Br. 18-23.[30] That is not the law. New York extortion law in effect in

---

[29] Even Petitioners acknowledged that inducing victims to "part with" property satisfies the "obtaining" element. Their proffered jury instruction stated: "In order to establish the predicate act of extortion under the Hobbs Act, the plaintiffs must prove that they *parted with* property . . . ." Final Pretrial Order, R1101, Tab Q No. 2. Making a victim "part with" or "give up" property, *see* OR Br. 33, is the "plain-English" way of expressing the Hobbs Act's obtaining element, *see, e.g.*, *Modern Federal Instructions, Criminal*, Matthew Bender & Co. (2001), Form Instruction 50-13.

[30] Petitioners cite commentary to the Field Penal Code for the proposition that extortion requires taking, *see* Sch. Br. 19, even though New York's first penal statute–the Penal Code of 1881–did not adopt the Field Code in its entirety. *See United States* v. *Mazzei*, 521 F.2d 639, 654 (3d Cir. 1975) (Gibbons, J., dissenting). To the extent that this commentary is relevant, it makes clear that robbery, larceny, extortion, and embezzlement must be "carefully distinguished." Proposed Model Penal Code of the State of New York § 584 (1865). Extortion requires "obtaining," N.Y. Penal Code §§ 850-857 (1944); robbery and larceny require "taking," *id.* §§ 1290, 2120, *e.g.*, a removal of tangible personal property, *see, e.g.*, Wayne R. LaFave & Austin W. Scott, Jr., 2 SUBSTANTIVE CRIMINAL LAW §§ 8.2, 8.11 (under common law, larceny and robbery required a trespassory taking); §§ 8.11, 8.12 (reflecting no requirement of a trespassory taking for extortion); § 8.12(b) (while robbery requires a taking from the person, extortion does not).

Petitioners also argue that because *People* v. *Ashworth*, 222 N.Y.S. 24 (App. Div. 1927), applied a more restrictive definition of property to a *larceny* charge, the same should hold here. Sch. Br. 23 n.17. But whether larceny required a "physical taking . . . of some concrete article," 222 N.Y.S. at 27-28, such a view has no relevance to extortion, as to which physical taking is not an element; Scheidler concedes as much, Br. 21 n.15.

1946 expressly prohibited coercive conduct involving property, without regard to whether the extortionist gained possession:

> The *compelling or inducing* of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property within the last two sections.

N.Y. Penal Code § 853 (1944).[31] This provision is codified under Article 80 of the New York Penal Code—titled "Extortion and Threats"—not under Article 48, titled "Coercion."[32] RA 1a-4a. By its plain terms, § 853 shows that "extortion" under New York law covers wrongful acts to induce property

[31] Pre-Hobbs Act state case law also makes clear that the extortionist need not obtain possession of the victim's property. *See, e.g., People* v. *Scheppa*, 295 N.Y. 359, 361 (1946) (affirming conviction where victim was made to "part with" money that defendant did not receive). OR (Br. 34) cites *People* v. *Ryan*, 232 N.Y. 234 (1921), to suggest receipt is necessary, but *Ryan* found criminal intent, not "obtaining," to be lacking.

[32] Petitioners' contention (OR Br. 35-36; Sch. Br. 28-32), that they may be guilty only of "coercion" is misguided; extortion is simply a subset of coercion that involves property, and Petitioners' conduct easily falls within that subset. Coercion involves the use of force to compel another to engage or refrain from engaging in certain conduct. *See* N.Y. Penal Law § 530 (1909). Extortion occurs whenever coercion is used to take control of another's property. Indeed, non-public official extortion is called "coercive extortion." *Evans*, 504 U.S. at 261 n.9. If only liberty is the object of a threat, only coercion has occurred. Thus, using force to make one give up the right to free speech is coercion but not extortion. But wrongful conduct designed to coerce others to cede control over decisions about the use of their assets is both coercion and extortion. *See, e.g., People* v. *Wisch*, 296 N.Y.S.2d 882, 884-86 (Sup. Ct. 1969) (defendant liable for both coercion and extortion for threatening to ruin milk dealers' businesses if they did not agree to fix prices). Extortion *is* coercion, for coercion is a lesser included offense. *See People* v. *Eboli*, 313 N.E.2d 746, 748 (N.Y. 1974); *cf. People* v. *Powell*, 50 Cal. App. 436, 440 (Dist. Ct. App. 1920) (extortion "involves an element of coercion").

owners to destroy their property; the extortionist obtains control without receiving anything. There is no plausible reason to think the Hobbs Act Congress viewed similar wrongful conduct against business assets in a more benign light.

This Court has made clear that acquiring control over the use of property is "obtaining property" for Hobbs Act purposes. *United States* v. *Green*, 350 U.S. 415, 421 (1956), reversed a lower court holding that the Act was limited to "the taking of property from another for the extortionist's personal advantage." As the Court explained, Hobbs Act extortion "in no way depends upon having a direct benefit conferred *on the person who obtains the property*." *Id.* at 420 (emphasis added).[33] *Green*'s holding that the extortionist has "obtained the property" even when someone else "receives" it shows that "obtain" does not mean "receive." Regardless of the property's final disposition, what the extortionist obtains is *control*.

This sound principle undergirds the many appellate rulings that "loss to the victim" is the gravamen of extortion.[34] Although "most extortionists undoubtedly seek a direct and tangible economic benefit," others "may be motivated only by a desire to humiliate the victim." *Lewis*, 797 F.2d at 364

[33] *See also* Model Penal Code § 223.05 (to "obtain" is to cause a transfer of a property right . . . "whether to the obtainer or another").

[34] *See, e.g., United States* v. *Stillo*, 57 F.3d 553, 559 (7th Cir. 1995); *United States* v. *Hairston*, 46 F.3d 361, 365 (4th Cir. 1995); *Lewis*, 797 F.2d at 364; *United States* v. *Clemente*, 640 F.2d 1069, 1079-80 (2d Cir. 1981); *United States* v. *Frazier*, 560 F.2d 884, 887 (8th Cir. 1977); *United States* v. *Starks*, 515 F.2d 112, 124 (3d Cir. 1975); *United States* v. *Hyde*, 448 F.2d 815, 843 (5th Cir. 1971); *United States* v. *Jacobs* 451 F.2d 530 (5th Cir. 1971); *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964). Thus, Hobbs Act liability attaches when the extortionist uses wrongful conduct to obtain control over another's assets. *See Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963) (extortion whose object was "control over" a boxer); *cf. Rutkin* v. *United States*, 343 U.S. 130, 131, 136-37 (1952) (money is taxable if extortionist has "control over it").

n.3 (noting that it would violate the Hobbs Act to demand that victim burn $1 million in cash). Some—as here—seek to wrest control of another's use and control of property for political or religious reasons. Still others shake down competitors to affect their market share. *See, e.g., Tropiano*, 418 F.2d at 1076 (making victim give up right to solicit trash removal business satisfied "obtaining property" element); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980); *Spatarella*, 34 N.Y.2d at 162. If an extortionist threatens violence against a refuse collector, for example, seeking to force it to abandon a route, it is extortion even though the extortionist would still need to bid for the job to acquire it. The possibility of increased market share may be the *motive* for the extortion, but the property *obtained* is control over the victim's business asset. The "obtaining" is complete once the extortionist uses wrongful conduct designed to gain control.[35]

Petitioners plainly attempted to obtain Respondents' property, and in some cases they succeeded. For 14 years, PLAN used terrifying "blitzes" to decree the ends to which the Respondent clinics could dedicate their premises, their equipment, and the services of their personnel. PLAN members also threatened that unless clinic property was not used on particular days, or unless contracts for particular services were cancelled, they would use whatever means were necessary, including force and violence, to accomplish that goal. Thus, in 1985, PLAN demanded a "Christmas Truce," and

[35] *United States* v. *Panaro*, 266 F.3d 939 (9th Cir. 2001), is not to the contrary, *see* Sch. Br. 12. *Panaro* observed in *dicta* that, though it "'is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom,'" "someone—either the extortioner or a third person—must receive the property of which the victim is deprived." *Id.* at 948 (internal citation omitted). In cases like this one involving extortion of control over business assets, the defendant receives precisely that which the victim is made to relinquish: control.

Scheidler told all Chicago-area clinics to halt abortion services on a given day, threatening to enter their premises for compliance inspections and take all necessary action to stop medical procedures if they failed to comply.[36] Understandably, clinics often capitulated rather than expose their staff and patients to danger. T 1378, 1877-78. Indeed, Petitioners boasted that "prolifers in 17 cities did not need to risk arrest because all of the [clinics] closed down for fear of the upcoming rescues." RA 5a.

Respondent patients likewise were threatened with bodily harm if they proceeded with their lawful economic relationships with the clinics. When Respondents did not comply with PLAN's demands, PLAN members beat on patients' cars, grabbed and pulled them, scratched and clawed them, struck them, and threw them to the ground. *See* p.2, *supra*. Although some refused to give in, *e.g.*, RA 25a-27a; T 1872, others surrendered their right to obtain services in exchange for a fee rather than face the attacks, *e.g.*, T 1918-20. The Hobbs Act criminalizes just this type of strong-arming of lawful economic decisions.

C. Petitioners Used Threats and Force To Obtain "Consent."

Petitioners unquestionably sought to induce Respondents "consensually" to surrender their property. As the Second Circuit has observed, "consent" under the Hobbs Act is somewhat illusory. The extortionist foists upon the victim the Hobson's choice of "relinquishing some property immediately or risking unlawful violence resulting in other losses," and the victim chooses "what he perceives to be the lesser harm." *Arena*, 180 F.3d at 395 (citing 91 Cong. Rec. 11,904-

[36] *See also* RA 17a-20a, PX 17A p. 1 ("It is our hope that the clinic operators will willingly close for the day. If not, they will have to face the reality of dedicated pro-lifers who will intercede to [stop abortions].").

07). Creating such "choices" was Petitioners' *modus operandi*.

Thus, the property Petitioners destroyed was not the property they "obtained." *See* OR Br. 42-43; Sch. Br. 15-16. Obviously, the destruction of clinic property was not consensual. Violence and vandalism were the *means* of the extortion, not the end.[37] *See United States* v. *Enmons*, 410 U.S. 396 (1973) (damage to transformer was means, not object, of extortion). As in most extortion schemes, Petitioners used force to make credible their threats that harm would occur—or continue—if their victims refused to surrender control of their property. That control was what Petitioners unlawfully obtained and sought to obtain.[38]

---

[37] Petitioners complain, *e.g.*, OR Br. 4-5; Sch. Br. 6, that Respondents' counsel argued in closing that each time PLAN physically closed a clinic, it was extortion. Because each act of force functioned as an express or implied threat that the attacks would continue, counsel's argument was correct. (Notably, Petitioners did not object to such argument. T 5003, 5005, 5008, 5037.) But even if the argument omitted the consent element, it is well-settled that counsel's arguments do not control; jury instructions do. *See Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000). The jury was properly instructed that the judge, not counsel, would instruct them on the law, and that they were to follow those instructions, *see* T 4932, which required the element of consent, *see* JA 136-37. Also, because the jury was correctly instructed that the Hobbs Act prohibits attempts, *see* JA 136-37, it properly could have found each forced closing to be an attempted extortion, *see Arena*, 180 F.3d at 393.

[38] Petitioners' *amici* say that FACE would not have been enacted if Petitioners' conduct was covered by the Hobbs Act, *e.g.*, *States of Alabama, et al.* Br. 17-18. But nothing in FACE suggests Petitioners' conduct fell outside the Hobbs Act or RICO. Congress's decision to enact FACE in 1994 cannot dictate the meaning of the 1946 Hobbs Act or the 1970 RICO Act. *See, e.g., Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968). FACE explicitly provides that "[n]othing in this section shall be construed to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section." 18 U.S.C. § 248(d)(3). Thus, victims can sue for both violations of FACE and violations of RICO that incorporate Hobbs Act predicates. *See, e.g., Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coalition of Life Activ-*

D. Petitioners' Conduct Was "Wrongful."

Contrary to OR's protestations, (Br. 44-46) PLAN's "blitzes" and exploitation of Respondents' understandable fears of blitzes were "wrongful" under the Hobbs Act. The Act gives no license for extortion to advance personal moral codes. "There is no exception to the Hobbs Act permitting extortion for [a religious] purpose," *United States* v. *Starks*, 515 F.2d 112, 124 (3d Cir. 1975), nor for a social cause, *United States* v. *Mitchell*, 463 F.2d 187, 193 (8th Cir. 1972) (rejecting exemption for civil rights activity, and quoting Congressman Hobbs: "[A] crime is a crime, no matter who commits it"); *see also United States* v. *Cerilli*, 603 F.2d 415, 419-20 (3d Cir. 1979) (extorting contribution to political party). Extortionists may always cite some benign or even laudable goal for their crime—to pay for a child's education, to obtain customers, to further political or social ends—but no goal justifies acts or threats of force to make others surrender lawful property. As this Court observed in *NOW I*, 510 U.S. at 260, racketeering harms the economy regardless of the perpetrators' motives.[39] And, as the concurring opinion of Justices Souter and Kennedy explained, a "bad motive" requirement would protect both too little and too much. *Id.* at 263-64. The text, history and purpose of the Hobbs

---

ists, 23 F. Supp. 2d 1182, 1188 (D. Or. 1998). The United States, which pursues Hobbs Act and FACE prosecutions in tandem, agrees. *See* U.S. Dep't of Justice, National Task Force on Violence Against Health Care Providers, *Report on Federal Efforts to Prevent and Prosecute Clinic Violence, 1998-2000*, at 1, *available at* http://www.usdoj.gov.

[39] In *United States* v. *Culbert*, 435 U.S. 371 (1978), the Court acknowledged the Act's purposeful breadth, including its clear intent to reach conduct that also violates state law. "Congress intended to define as a federal crime conduct that it knew was also punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state ... extortion statutes." *Id.* at 379. The import of the Act in declaring Congress' purpose to reach interference with interstate commerce "in any way or degree" is unmistakable. 18 U.S.C. § 1951(a).

Act—like RICO—make clear that one gets no immunity for wrongful conduct by citing a legitimate goal.

Enmons, 410 U.S. at 400, on which Petitioners heavily rely (OR Br. 44-46; Sch. Br. 15-16 & n.11), is not to the contrary. *Enmons* recognized a legitimate-labor-objective exception to the Hobbs Act, which existed under New York pre-Hobbs Act extortion law and common law before that. *See A.S. Beck Shoe Corp.* v. *Johnson*, 274 N.Y.S. 946, 952-54 (Sup. Ct. 1934). (OR errs (Br. 45) in suggesting that the Act does not refer to labor, *see* § 1951(c).) Every court to consider the question in the context of force and violence has agreed that *Enmons* "merely carved out a labor exception to the traditional law of extortion codified in the Hobbs Act." *United States* v. *Zappola*, 677 F.2d 264, 269 (2d Cir. 1982); *see also United States* v. *Mulder*, 273 F.3d 91, 104 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1344 (2002); *United States* v. *Debs*, 949 F.2d at 200-01. Courts long have recognized that, if extended outside the labor context, *Enmons* would eviscerate the Hobbs Act, because extortionists can always cite a benign purpose for their acts. *See, e.g., United States* v. *Sturm*, 870 F.2d 769, 772 (1st Cir. 1989).[40] Not only does this case not involve legitimate labor goals, but Petitioners also had no rightful claim to Respondents' property.[41]

---

[40] As Scheidler notes (Br. 6), the Hobbs Act covers wrongful threats of economic as well as physical harm. When one has a right to threaten economic harm, as with hostile takeovers, boycotts, or lawful pickets, some courts have found it not wrongful, but merely a form of "hard-bargaining," to use that threat to obtain an advantage, or to condition forbearance on a *quid pro quo*. *See, e.g., Viacom Int'l, Inc.* v. *Icahn*, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991); *United States* v. *Albertson*, 971 F. Supp. 837, 845-46, 848-49 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998). These "hard-bargaining" and "moral suasion" cases have no application here because Petitioners eschewed lawful conduct in favor of violent attacks, which they had no right to commit. PX 35C, 23B; RA 7a.

[41] Petitioners' attempts to invoke the rule of lenity similarly fall short. OR Br. 49; Sch. Br. 32-33. This Court has expressly rejected the application of the rule of lenity to the Hobbs Act. *Culbert*, 435 U.S. at 379. That rule applies only when "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 138-39 (1998) (internal quotation marks and citations omitted), and as the Court said in *Culbert*, 435 U.S. at 379, "we decline to manufacture ambiguity where none exists."

II. EVEN APART FROM THE HOBBS ACT PREDICATES, THE JUDGMENT WOULD STAND.

Even without the Hobbs Act predicates, the judgment is fully supported because the jury's separate finding of 25 state law extortion predicates remains undisturbed. JA 143, Q4(b). Contrary to OR's arguments (Br. 49-50), *United States* v. *Nardello*, 393 U.S. 286 (1969), does not hold that state extortion offenses must be identical to Hobbs Act extortion to be RICO predicates. *Nardello*, decided just before RICO was enacted, stands for the well-recognized rule that, in determining what state offenses are predicates under a federal statute that incorporates state extortion law, "the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged." 393 U.S. at 295.

Nardello holds that labels are irrelevant in considering state extortion offenses, and a state offense is extortion if the conduct "would be generically classified as extortionate." *Id.* at 290, 294. The test for determining whether the charged acts fit into the generic category of the predicate offense is whether the offense constitutes "a type of activity generally known or characterized in the proscribed category." *United States* v. *Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977).[42]

---

[42] *Taylor* v. *United States*, 495 U.S. 575 (1990), (OR Br. 49) provides Petitioners no more help. Like *Nardello*, *Taylor* holds that in designating predicate offenses under the three-strikes law, Congress used "uniform, categorical definitions to capture all offenses of a certain level of seriousness . . . regardless of technical definitions and labels under state law." 495 U.S. at 590.

"Generic" extortion is "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats," *Nardello*, 393 U.S. at 290.[43] State laws criminalizing such conduct "generically" are viewed as extortion statutes, regardless of the scope of Hobbs Act extortion. Because, as shown above, Petitioners' conduct involved using acts and threats of force to obtain control over something of value, that is, Respondents' business decisions, it "generically" constituted extortion.[44]

OR's notion that RICO incorporates only state offenses redundant of the Hobbs Act (Br. 49) is flatly inconsistent with RICO's scheme. *See United States* v. *Turkette*, 452 U.S. 576, 586 (1981).

Thus, even without the Hobbs Act predicates, the jury's verdict would stand on the 25 state extortion predicates. The weight of authority holds that, if some predicate acts are overturned on appeal but two or more remain, RICO's pattern requirement is satisfied and the verdict should be affirmed. *See, e.g., United States* v. *Thomas*, 114 F.3d 228, 250-51 (D.C. Cir. 1997); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981); *Brennan* v. *United States*, 867 F.2d 111, 114-16 (2d Cir. 1989). This rule is consistent with

[43] State extortion laws bearing different labels include Wis. Stat. § 943.30 (1965) ("threats") and Minn. Stat. § 609.27 (1967) ("coercion"), *see Nardello*, 393 U.S. at 294 n.12.

[44] Physical transfer cannot be a requirement of "generic" extortion law, for numerous state extortion convictions have been secured where the "something of value" targeted by the extortionist was intangible and could not be physically received. *See, e.g., State* v. *Taylor*, 632 P.2d 892, 896-97 (Wash. Ct. App. 1981) (a threat to force victim to "close down" business and "leave town in 10 days" was attempt to obtain property under state extortion law; the "owner" of property is one who has exclusive right to "exert control" over it); *People* v. *Baker*, 88 Cal. App. 3d 115, 118-19 (1978) (upholding extortion conviction where defendant wrongfully attempted to induce victim to drop administrative protest with state alcohol control board).

Neder v. *United States*, 527 U.S. 1, 17 (1999), holding that a verdict will not be reversed if "overwhelming evidence" in the trial record demonstrates that the "verdict would have been the same absent of the error." Here, the jury independently found *not just two but 25 violations*—"overwhelming evidence" of the pattern of Petitioners' state extortion crimes.

Furthermore, all of the acts that supported the jury's finding as to Hobbs Act violations also supported its findings as to state law violations, as Petitioners concede. *See* OR Br. 5 n.9.[45] Thus, in reaching its verdict, the jury necessarily determined that these acts were sufficiently "related" and "continuing" to constitute a RICO pattern. *See H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989). Having found a pattern when considering the "virtually identical" Hobbs Act claims, the jury unquestionably would have found a pattern if only state extortion were at issue,[46] and no jury reasonably could have found otherwise, *cf. Neder*, 527 U.S. at 16-17. Petitioners virtually admitted that their many acts of force and violence were related and continuing, *e.g.*, PX 3B, 20B, 25A, 36, 162B, 312, 513, 1123; RA 5a-7a, and did not contest the pattern issue at trial, *see, e.g.*, T 5044-111 (in 67 pages of closing argument, Petitioners never argued there was no pattern). The jury could not possibly have

[45] Indeed, as OR recognizes, the jury found slightly fewer federal than state violations, presumably because of the interstate-commerce element of the former; however, with regard to those offenses as to which the interstate-commerce element was satisfied, the jury found both federal and state law to have been violated. *See* JA 144 Q4(d) (finding that the total of 21 acts of actual or attempted federal extortion and 25 acts of actual or attempted state extortion equaled 25, showing that the Hobbs Act violations were a subset of the state-law violations).

[46] Petitioners' reliance on *Griffin* v. *United States*, 502 U.S. 46 (1991), (Sch. Br. 17), is misplaced. *Griffin* affirmed a general verdict even though it may have rested on a prong of the instruction as to which the evidence was insufficient. *Id.* at 60; *see also Johnson v. United States*, 520 U.S. 461, 469 (1967) (improper jury instruction subject to harmless error analysis).

found a pattern in Petitioners' 21 Hobbs Act violations but not in their 25 state extortion violations.[47]

III. RICO PERMITS PRIVATE LITIGANTS TO SEEK INJUNCTIVE RELIEF.

Petitioners urge a reading of RICO that does violence to the statute's express terms and is inconsistent with the principle that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979). Petitioners inaccurately claim that the decisions of the courts below are "aberrant" events in a thirty-year history of RICO decisions. OR Br. 8; Sch. Br. 36. In fact, the Seventh Circuit was the first court of appeals to be required to decide whether a permanent injunction was available to private plaintiffs who demonstrate entitlement.[48] Courts that had previously addressed the point had done so only in *dicta* and even in *dicta* were split on the question. SPA 6a; Opp. Cert. 7-8.

A. RICO Expressly Authorizes Injunctive Relief to Private Parties.

Statutory interpretation begins with a statute's language and where, as here, that language is unambiguous, it ends

[47] At trial, Petitioners made no meaningful objection to the state extortion instruction, and their failure to object with any specificity, plus their failure to raise the objections properly in the Seventh Circuit, waived any possible objections. *See* Opp. Cert. 23-26. The state extortion violations are also sufficient to support the full measure of damages, for the jury awarded all the damages sought by the DWHO and SWHO, JA 146, proving that the jury found that each act of extortion against the clinics had been proved.

[48] The case Petitioners cite most frequently, *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), considered only whether *interim* injunctions were available. *Wollersheim* decided the issue on an undeveloped record. The Ninth Circuit raised the issue on its own initiative; both parties and the lower court assumed injunctions were available to private parties. *See id.* at 1080.

there. *See Estate of Cowart* v. *Nikos Drilling Co.*, 505 U.S. 469, 479 (1992). Section 1964(a) unambiguously gives district courts broad power to remedy RICO violations, including the power "to prevent and restrain violations of section 1962" and to "impos[e] reasonable restrictions on the future activities" of statute violators.[49]

Section 1964(a) does not address standing. Standing is conferred in § 1964(b) for the United States and in § 1964(c) for private parties whose business or property is injured by RICO violations. Nothing in either § 1964(b) or § 1964(c) precludes the United States or private parties from seeking equitable remedies under § 1964(a). By giving private plaintiffs standing, § 1964(c) creates a gateway for them to seek appropriate remedies, including injunctions.

Because nothing in RICO's text precludes injunctive relief to private parties, Petitioners are forced to argue (OR Br. 9-10; Sch. Br. 41-42) that a limitation on the powers conferred by § 1964(a) is imposed by other subsections, which, they say, make the government the exclusive beneficiary of remedies identified in § 1964(a). According to Petitioners, since the government is authorized to seek *interim* injunctive relief under § 1964(b), the absence of an express reference to equitable relief for private plaintiffs in § 1964(c) precludes private-party injunctions. Nothing in § 1964(b) states or im-

[49] The Seventh Circuit correctly rejected Petitioner Scheidler's argument (Br. 42-43 n.31) that § 1964(a) is "purely jurisdictional." Section 1964(a) "grant[s] district courts authority to hear RICO claims and then spells out a non-exclusive list of the remedies district courts are empowered to provide in such cases." SPA 9a. Even OR says (Br. 9) that § 1964(a) both "confers jurisdiction and authorizes certain remedies." Because § 1964(a) identifies remedies, it cannot be "purely jurisdictional." The Seventh Circuit's ruling comports with this Court's jurisprudence. *See, e.g., Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("jurisdiction" refers to the court's "power to declare law," not to remedies or standing).

plies, however, that § 1964(a) is restricted to the government.[50]

Similarly, § 1964(c) does not indicate that treble damages are a private plaintiff's exclusive remedy. As the Seventh Circuit reasoned, because the government's authority to seek permanent injunctions stems from the combination of the grant of a right of action in § 1964(b) and the grant of authority for courts to enter injunctions in § 1964(a), there is "no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)." SPA 8a. Petitioners claim (OR Br. 14; Sch. Br. 41) that, because § 1964(b) says the Attorney General "may institute proceedings," while § 1964(c) says private plaintiffs "may sue," only the Attorney General can seek permanent injunctive relief. But this conclusion does not follow. As the Seventh Circuit found, these phases are "equivalent" (SPA 8a), and both allow parties with standing to use §1964(a) to seek injunctions.

In addition, federal courts are "presum[ed]" to retain all of the equitable powers conferred by the Judiciary Act of 1789, 1 Stat. 73, 78, unless a statute clearly denies such equitable relief. *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002); *see also Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). This Court has long required the "clearest command" from Congress before federal courts can be stripped of their equitable powers. *Califano*, 442 U.S. at

[50] That § 1964(b) authorizes the Attorney General to seek *temporary* relief is not evidence that only the Attorney General is permitted to seek permanent forms of relief. "Indeed, if the availability of injunctive relief were determined by reference to Section 1964(b), rather than Section 1964(a), Section 1964(a) would be superfluous," *Chambers Dev. Co.* v. *Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540 (W.D. Pa. 1984), and "courts should disfavor interpretations of statutes that render language superfluous," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

705; *see also Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.").

Here, RICO expressly provides for injunctive relief; but even absent § 1964(a), not even Petitioners contend that RICO expressly *denies* injunctive relief to private parties. Congress enacted RICO with the understanding that the courts of law and equity had merged, broadly enabling courts, in their discretion, to award equitable relief as a remedy for injured parties with standing. *See Grupo Mexicano*, 527 U.S. at 318-19; *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977). Moreover, RICO includes both the unrestricted grant of equitable power in § 1964(a), and a statutory mandate that its stated remedies are not intended to supersede any additional civil remedies available by virtue of other provisions of law. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947.

The injunctive remedy is particularly important because RICO addresses ongoing criminal enterprises that in many cases, as here, commit open-ended pattern crimes. In addition, in class actions such as this one, "injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation." *Califano*, 442 U.S. at 705. Nothing in the text of RICO even remotely suggests that courts should be stripped of their inherent equitable powers.[51]

[51] Petitioners try to avoid the inherent federal court power to grant equitable relief by citing cases where this Court has refused to find an

Petitioners also cite cases where this Court has refused to find an implied *damages* remedy where a statute did not provide one. *See, e.g., Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981); *see also Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979). These cases are inapposite because RICO explicitly provides for injunctive relief in § 1964(a); because § 904(b) expressly provides that RICO does not supersede other civil remedies; and because the federal courts have inherent power to award injunctions.

The Seventh Circuit's ruling is also faithful to the statutory mandate that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970). RICO's liberal-construction clause—a rarity in criminal statutes—was included to ensure that "Congress' intent is not frustrated by an overly narrow reading of the statute." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). Indeed, this Court consistently has rejected interpretations that would unduly limit RICO's scope.[52] This Court has stressed that "*the statute's remedial purposes are nowhere more evident than in the provision of a private action* for those injured by racketeering activity." *Sedima*, 473 U.S. at 498 (emphasis added). Petitioners' argument that RICO confines the remedies specified in § 1964(a) to only the government undermines RICO's liberal-construction clause and this Court's stated view in *Reves* of the importance of

implied private cause of action. OR Br. 11; Sch. Br. 44, citing, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 464-65 (1974). But Petitioners' argument mistakenly conflates right to sue with remedy. *See Franklin*, 503 U.S. at 69.

[52] *See, e.g., Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 165 (2001); *Salinas* v. *United States*, 522 U.S. 52, 61-66 (1997); *NOW I*, 510 U.S. at 256-62; *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-37 (1989); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 498 (1985); *Turkette*, 452 U.S. at 587-591.

broadly construing RICO's remedies section.[53] *See Chambers*, 590 F. Supp. at 1540 ("If a private plaintiff were denied the right to sue for equitable relief, th[e] purpose [of the liberal-construction clause] would be frustrated.").

B. Petitioners Improperly Attempt To Narrow RICO.

Petitioners argue that the interpretation of §1964(a) is controlled by two nearly century-old antitrust cases. OR Br. 11-15; Sch. Br. 37-41. This argument (like Petitioners' flawed reading of § 1964) reads part of the antitrust laws out of context to support a result that contradicts a plain reading of the RICO statute as a whole. Petitioners also ignore key structural differences between the antitrust laws and RICO.

Neither *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904), nor *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), held that the treble damages provision of the Sherman Act excluded private injunctive relief. Neither case rested on the Sherman Act treble damages provision; rather, both turned on standing. *See Northern Sec.*, 194 U.S. at 70

[53] Honoring RICO's liberal-construction clause, courts have rejected similarly restrictive readings of § 1964. For example, *Fireman's Fund Insurance Co.* v. *Stites*, 258 F.3d 1016 (9th Cir. 2001), rejected the argument that because the language of § 1964(d) permits only the government to use a criminal RICO conviction as collateral estoppel, private plaintiffs could not do so. The court held that the abrogation of collateral estoppel requires a clear expression, not mere silence, and found that Congress did not intend to deny private plaintiffs this traditional remedy. *See id.* at 1020; *see also County of Cook* v. *Lynch*, 560 F. Supp. 136, 139 (N.D. Ill. 1982); *Anderson* v. *Janovich*, 543 F. Supp. 1124, 1128-29 (W.D. Wa. 1982). Similarly, a decision not to let private parties seek injunctions suggests that granting them the right to seek treble damages "manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted [to] subtraction in a remedial statute that must be liberally construed strains even the legal imagination." G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 NOTRE DAME L. REV. 237, 331-32 (1982).

(plaintiff had no standing because it lacked antitrust injury); *Paine Lumber*, 244 U.S. at 471 (same). The Court's decision in both cases hinged on § 4 of the Sherman Act, the statutory mandate that the Attorney General bring suits to restrain violations. That section provides in part:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and *it shall be the duty of the several district attorneys of the United States*, in their respective districts, under the direction of the Attorney General, to *institute proceedings* in equity to prevent and restrain such violations.

(Emphasis added). Because § 4 made it the government's express duty to sue for injunctions, the Court concluded that Congress did not intend private parties to do the same.

In marked contrast to § 4 of the Sherman Act, RICO's permanent-injunctions section, § 1964(a), does not mention any particular party; it directly grants power to issue injunctions to the federal courts without restriction as to party. If permanent-injunction language had been included in § 1964(b), which mentions only the government, or if the same governmental-duty language in Sherman § 4 had been included in § 1964(a), Petitioners would have a stronger argument. But RICO's remedies section was not written that way. The important textual differences between Sherman § 4 and RICO § 1964(a) show that *Paine Lumber* and *Northern Securities* (both decided before the merger of law and equity, *Atlas Roofing Co.* 430 U.S. at 459), have no application.

Like the Sherman Act, the Clayton Act contains major structural differences from § 1964. Section 15 of the Clayton Act, 38 Stat. 730, 736-37 (1914), 15 U.S.C. § 25, is almost identical to § 4 of the Sherman Act, expressly imposing a duty on the *government* to "institute proceedings in equity to prevent and restrain" violations; RICO's § 1964(a) has no such governmental duty clause. Because § 1964(a) is not limited to any particular party, it was unnecessary for Congress to address private injunctive relief separately, as it was in the Clayton Act, where § 15 contains the government's "duty" language. 15 U.S.C. § 26.[54]

In fact, Congress deliberately drafted RICO separate from the antitrust laws to avoid antitrust precedent on matters such as standing and causation. *See Sedima*, 473 U.S. at 498. As a result, this Court often has rejected the antitrust analogy when analyzing RICO. *See, e.g., Tafflin* v. *Levitt*, 493 U.S. 455, 460 (1990); *Sedima*, 473 U.S. at 498. Where, as here, the language and structure of the antitrust laws significantly differ from that of RICO, those laws provide no meaningful guidance.

C. RICO's Legislative History Does Not Help Petitioners.

Petitioners' foray into legislative history (OR Br. 15-18; Sch. Br. 43-48) ignores this Court's admonition that it is the language of RICO itself that provides "the most reliable evidence of [congressional] intent," *Turkette*, 452 U.S. at 593. This Court consistently has held that only the "most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984); *see also Salinas*, 522 U.S. at 57. Because RICO's text is unambiguous, there is no need to resort to legislative history. *Cf. NOW I*, 510 U.S. at 261. But even if there were some ambiguity in RICO, Petitioners cannot satisfy the high burden of establishing clear congressional intent to limit the federal courts' power to grant injunctions.[55]

---

[54] In drafting RICO, Congress combined the language from several sections of the Clayton Act: § 4, authorizing private treble damages; § 15, making it the duty of the Attorney General to sue for injunctions; and § 16, authorizing private injunctions, into a single section, § 1964.

[55] Scheidler cites his former counsel, G. Robert Blakey, in support of his legislative history argument. Sch. Br. 45. But Scheidler neglects to cite Professor Blakey on the RICO issue before the Court for the good

Petitioners urge two particularly unreliable uses of legislative history. First, Petitioners suggest, relying largely on *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), that because Congress did not enact a proposal that would have separately provided for private injunctions, the broad statutory grant of equitable power in § 1964(a) should be restricted to the government. OR Br. 17 n.16; Sch. Br. 47. This argument is based on the erroneous notion that Congress was repeatedly presented with the opportunity expressly and separately to permit private plaintiffs to seek injunctions and repeatedly rejected it. OR Br. 16; Sch. Br. 48; U.S. Br. 12-13.

In fact, Congress never rejected such a provision. In RICO's floor debate, Representative Steiger offered an amendment addressing a number of RICO's provisions, including the amount in controversy, intervention by the Attorney General, statute of limitations, damage remedies for the government, and private injunctions. *See* 116 Cong. Rec. 35,346 (1970). "The proposal was greeted with some hostility because it had not been reviewed in Committee, and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88; *see also* Blakey, 62 NOTRE DAME L. REV. at 550, n.103 (judiciary committee members agreed to oppose all floor amendments). Petitioners make much of the com-

---

reason that, in his extensive writings, Professor Blakey repeatedly has observed that Congress clearly intended in RICO to provide private parties with equitable remedies. *See, e.g.*, G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 NOTRE DAME L. REV. 237, 331 (1982) ("It is difficult to see how a court could conclude that RICO does not provide equitable relief for private parties. Section 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history."); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center* v. *Wollersheim*, 62 NOTRE DAME L. REV. 526, 551 (1987). Indeed, Scheidler's own 1993 brief to this Court appeared to concede that private injunctions were available. *See* Br. for Scheidler Resp'ts, *NOW I*, *available at* 1993 WL 459767, at *17.

ments surrounding the amendment's withdrawal (OR Br. 17-18; Sch. Br. 47), but they fail to quote what Representative Steiger himself said: "[T]he bill as it now stands . . . may have this option [of equitable relief]." 116 Cong. Rec. 35,347 (1970).

After RICO became law, a similar amendment affecting multiple provisions was introduced. 117 Cong. Rec. 46,386, 46,393 (1971). The Senate Judiciary Committee reported favorably on the bill, and it passed the Senate without a single vote against it, 118 Cong. Rec. 29,368-69, 29,379 (1972); but the bill was never voted on by the House, 119 Cong. Rec. 10,317 (1973).

The fact that RICO's sponsors asked that an amendment affecting many of RICO's provisions be withdrawn without a vote, or that the same bill was later approved without opposition by the Senate but not voted on by the House, says nothing about congressional intent regarding the particular proposed provision relating to private equitable relief. *See Craft*, 122 S. Ct. at 1425 (congressional inaction lacks significance because many inferences may be drawn from inaction). Failure to pass a bill that would have amended several of RICO's provisions may be explained by many reasons, including opposition to some other portion of the amendment or the belief that such a provision was redundant. *See Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (bill may fail if Congress believed existing legislation already incorporated change). This Court's decisions make clear that this type of legislative history is equivocal at best. It surely is not the requisite "clearly expressed legislative intent" that Petitioners must show to trump both RICO's text and the federal courts' inherent power.[56]

---

[56] *See Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (subsequent history is a dangerous ground on which to rely). The Ninth Circuit in *Wollersheim*

Petitioners' second legislative history argument is equally unavailing. They contend that because the Senate initially passed RICO without § 1964(c)'s treble damages provision, § 1964(c) must be read in a vacuum, as if § 1964(a) were not part of the statute. OR Br. 15; Sch. Br. 43-44. In essence Petitioners argue that the meaning of § 1964(a) is somehow frozen in time at a point when the bill had no application to private parties.[57] But Congress chose to put § 1964(c) into a section addressing remedies that it knew included subsection (a); and, having granted private parties standing, made no effort to change the language of § 1964(a) to limit its reach only to the government. Petitioners' argument ignores the principle that Congress legislates "through the passage of a bill which is approved by both Houses and signed by the President," not by versions of bills as they may have stood at some particular point prior to enactment. *Central Bank*, 511 U.S. at 186.

D. Private Injunctions Serve RICO's Express Purpose and Public Policy.

An express purpose of RICO is to eradicate crime in the United States "by establishing new penal provisions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

---

recognized that the language of § 1964 could be construed as allowing private injunctions. *See* 796 F.2d at 1084, 1085. However, it rejected this construction based on what it called the "mandate" of legislative history. As the Seventh Circuit ruled, SPA 6a, *Wollersheim*'s heavy reliance on particularly unreliable forms of supposed legislative history no longer conforms to this Court's jurisprudence, if it ever did.

[57] OR pretends (Br. 14) that the injunctive-relief issue was resolved by this Court's discussion of legislative history in *Sedima*. OR selectively quotes *Sedima*, conveniently ignoring the fact that *Sedima* was merely discussing the evolution of RICO's remedial provisions. Rather than holding that § 1964(a) *is* limited to injunctive actions by the United States, *Sedima* actually says "[t]he civil remedies in the bill passed by the Senate, S 30, *were* limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." 473 U.S. at 486-87 (emphasis added).

Pub. L. 91-452, 84 Stat. 922, 922-23 (1970). Congress created RICO's civil remedies to encourage private plaintiffs "to fill prosecutorial gaps," *Sedima*, 473 U.S. at 493, and to turn victims "into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity," *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000). Since government suits are brought to address harms to private parties, "[n]o satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves." *Bennett* v. *Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (en banc) (McMillian, J., concurring in part and dissenting in part) (quoting Blakey, 58 NOTRE DAME L. REV. at 331-32). And where racketeers who injure private businesses are judgment-proof, as Petitioners claim to be, *e.g.*, PX 1503, the threat of damages alone has no deterrent effect. Thus, private injunctive relief is essential to effectuate RICO's purpose.

Nor should the Court accept Petitioners' invitation (Sch. Br. 48-50; *see also* U.S. Br. 14) to limit the law's reach on policy grounds. Petitioners ask the Court to add an unwritten restriction to RICO because, they say, the courts are incapable of exercising discretion in response to private-party requests for injunctions. Yet neither Petitioners nor their *amici* point to a single instance in which a federal court has had any difficulty exercising equitable discretion in a private-plaintiff antitrust case, a power that antitrust laws have long allowed.

For decades this Court has recognized that "'[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case.'" *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990) (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). That the government may be entitled to a particular remedy in a given case would not automatically entitle private parties to the same relief. *See id.* And while not every remedy available under § 1964(a) will be appropriate in every case, *see Turkette*, 452 U.S. at 585, this fact affects neither the general availability of equitable relief

under RICO nor the specific grant of a traditional injunction here.

Petitioners' argument also ignores the statutory limits on a court's power to issue equitable relief. Section 1964(c) provides that persons injured in their business or property by reason of a violation of § 1962 "may sue therefor." This language introduces the limitation that there must be a direct nexus between the injury to business or property and any equitable relief awarded. Such restriction prevents the imposition of a remedy such as corporate dissolution unless it is shown that such remedy would redress the plaintiff's injury to "business or property," a very difficult showing to make. By contrast, here, the remedy—a traditional injunction—was specifically tied to protection of the property at issue.

After a full trial on the merits, the district court concluded that Petitioners have "a history of unlawful conduct," including "repeated acts and threats of extortion" against Respondents and other persons and business entities across the United States. SPA 133a. Based on the need to protect Respondents and the public from ongoing crime, it issued a permanent injunction to prevent future extortion. Such relief serves the very core of RICO's purposes, and this Court should decline Petitioners' invitation artificially to limit RICO's equitable remedies.

IV. APPLICATION OF RICO TO PETITIONERS' PATTERN OF WRONGFUL THREATS, FORCE, AND VIOLENCE WILL NOT CHILL LAWFUL PROTEST.

Imposition of RICO liability on those who use acts and threats of force and violence to compel their victims to surrender valuable uses of their property cannot chill *lawful* protest activities; it can only chill thuggery.[58] Every aspect of

[58] Petitioners' arguments in this regard, *e.g.*, OR Br. 25-28, Sch. Br. 35, are an impermissible attempt to resurrect OR's proposed Question 4 and Scheidler's proposed Question 3, on which *certiorari* was denied.

the trial below was guided by this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). *See, e.g.*, SPA 140a (tailoring injunction so as not to infringe protected speech or conduct). *Claiborne Hardware* held that harm caused by *protected* speech or conduct cannot serve as a basis for liability; only unprotected conduct—including wrongful threats—may be considered. *See* 458 U.S. at 920-21, 925-26. *Claiborne Hardware* also made clear that crimes committed by a member of a group may not be imputed to the group or its leaders unless specifically intended, and authorized or ratified, by those sought to be held responsible. *See id.* at 919-20, 925-27. This cardinal principle, barring findings of guilt for mere association, was faithfully applied to Petitioners and their enterprise. JA 136, 139-41.[59]

This is not a borderline case. Petitioners' campaign of hooliganism sets this case far apart from lawful picketing, leafleting, and civil rights activity such as the peaceful lunch counter sit-ins.[60] The jury was specifically admonished that

[59] The "parade of horribles" Petitioners and their *amici* trot out—*e.g.*, a protestor who *accidentally* breaks an opponent's glasses—were all precluded by the *Claiborne Hardware*-based jury instructions here, or by the requirements of RICO and the Hobbs Act themselves. To violate the Hobbs Act, the wrongful conduct must be designed to control another's property; it must involve the wrongful use of force, violence or fear; the extortionist must seek the victim's consent induced by duress; and the wrongful conduct must proximately cause damage and affect interstate commerce. Many protesters seek to affect government action (*e.g.*, storming the Capitol to protest war); but because governmental action is not property, such protest would not violate the Hobbs Act. For a RICO violation to comport with *Claiborne Hardware*, the conduct must be both intentional, and authorized or ratified by the extortionist's enterprise. *See* JA 131, 134, 136, 139-41. Such conduct, however motivated, is properly subject to RICO.

[60] The alarmist claims of Petitioners and their *amici* that the rulings below would brand Dr. Martin Luther King, Jr. a racketeer are baseless. Dr. King did not operate an enterprise through a pattern of violence or threats to intimidate others to give up their property rights. His peaceful

the "right to engage in peaceful protest" was not at issue. It was told that "peaceful picketing, leafleting and participating in the legislative process;" the expression of "a particular viewpoint;" uninvited, unwelcome, insulting and outrageous speech; and even advocacy of the use of force and violence could *not* be bases of liability. JA 131, 141. Asked to determine whether Petitioners went beyond protected speech and beyond mere sit-ins or blockades, the jury responded affirmatively, finding dozens of wrongful acts and threats of force and violence. As an extra safeguard, the jury was asked whether any of the predicate crimes was based on a mere sit-in or blockade. The jury answered, "No." JA 145 Q6. These safeguards ensured that it was the voluminous and overwhelming evidence of intentional, wrongful threats, force, and violence specifically intended by Petitioners and authorized or ratified by their enterprise—not lawful protest—that led to the verdict of liability against them. SPA 109a-141a (judgment of trial court reaching same conclusion).

This case shows that, when properly limited by First Amendment principles, RICO is a vital tool to combat nationwide campaigns of terror by organized groups that target lawful businesses of whose practices they disapprove. RICO is particularly important when the victim is a lawful but unpopular business or its customers, and when law enforcement cannot or does not protect those who, like the clinics and women here, are "especially vulnerable to the threat of mob violence." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 349 (1993) (O'Connor, J., dissenting).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

---

methods to secure the constitutional rights to which he was entitled were the antithesis of PLAN's *blitzkrieg* campaign.

Respectfully submitted,

A. STEPHEN HUT, JR.
DAVID W. OGDEN
TERRY A. MARONEY
KIMBERLY A. PARKER
RACHEL A. SHACHTER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 663-3100

KERRY A. MILLER
33 West Monroe Street
Chicago, IL 60601
(312) 507-2072

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Chicago, IL 60606
(312) 207-6400

Counsel for Respondents

SEPTEMBER 2002

APPENDIX A

N.Y. Penal Code (1944)

ARTICLE 80
Extortion and Threats

§ 850. Extortion defined

Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right. As amended, L.1917, c. 518, eff. Sept. 1, 1917.

§ 851. What threats may constitute extortion

Fear, such as will constitute extortion, may be induced by an oral or written threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family or to a corporation of which he shall be an officer, stockholder, employee or agent; or,

2. To accuse him, or any relative of his or any member of his family, of any crime; or,

3. To expose, or impute to him, or any of them, any deformity or disgrace; or,

4. To expose any secret affecting him or any of them; or,

5. To kidnap him or any relative of his or member of his family; or,

6. To injure his person or property or that of any relative of his or member of his family by the use of weapons or explosives. As amended L.1911, cc. 121, 602; L.1917, c. 518, eff. Sept. 1, 1917.

§ 852. Punishment of extortion

A person who extorts any money or other property from another, under circumstances not amounting to robbery, is punishable by imprisonment not exceeding fifteen years, if the same is done by means of force or a threat mentioned in section eight hundred and fifty or in either of the first four subdivisions of section eight hundred and fifty-one, and by imprisonment for not less than five years nor more than twenty years if the same is done by means of a threat mentioned in subdivisions five or six of the latter section. As amended L.1909, c. 368; L.1911, c. 602, eff. Sept. 1, 1911.

§ 853. Compulsion to execute instrument

The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property within the last two sections.

§ 854. Extortion committed under color of official right

A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority:

1. Arrests another, or detains him against his will; or,

2. Seizes or levies upon another's property; or,

3. Dispossesses another of any lands or tenements; or,

4. Does any other act, whereby another person is injured in his person, property, or rights,

Commits oppression and is guilty of a misdemeanor.

§ 855. Public officer taking illegal fees commits extortion

A public officer who asks, or receives, or agrees to receive, a fee or other compensation for his official service:

1. In excess of the fee or compensation allowed to him by statute therefor; or,

2. Where no fee or compensation is allowed to him by statute therefor,

Commits extortion and is guilty of a misdemeanor.

§ 856. Blackmail

A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening:

1. To accuse any person of a crime; or
2. To do any injury to any person or to any property; or,
3. To publish or connive at publishing any libel; or,
4. To expose or impute to any person any deformity or disgrace,

Is punishable by imprisonment for not more than fifteen years. As amended L.1909, c. 368, eff. Sept. 1, 1909.

§ 857. Attempts to extort money or property by oral threats

A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, orally makes such a threat as would be criminal under any of the foregoing sections of this article or of section five hundred and fifty-one, if made or communicated in writing, is guilty of a misdemeanor. The provisions of this section do not apply to matters governed by section eight hundred and fifty-one of this act. As amended L.1911, c. 121, eff. Sept. 1, 1911.

ARTICLE 48

Coercion

§ 530. Coercing another person a misdemeanor.

A person who with a view to compel another person to do or to abstain from doing an act which such person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,
3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 14B: Randall Terry's letter dated May 25, 1989]
(Excerpts)

OPERATION RESCUE

* * *

May 25, 1989

* * *

Since the last letter I wrote you from the Los Angeles County Jail an incredible amount of events have transpired. On April 29th, the National Day of Rescue II, rescue groups in 46 cities participated in rescue missions. Also, pro lifers in another 17 cities did not need to risk arrest because all of the killing centers closed down for fear of the upcoming rescues.

* * *

Your fellow soldier in the battle,
Randall A. Terry
Founder

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 23B: Joseph M. Scheidler's article
ACTIVISM: A New Direction, January 1989]
(Excerpts)

* * *

Aggressive tactics such as rescue missions, massive demonstrations, and protests at the abortuary sites and abortionists' homes are necessary.

* * *

One of the most effective activities taking place at present is Operation Rescue, the brainchild of Randall Terry of Binghamton, NY. Operation Rescue was officially launched in New York City in May, 1988, after a successful trial run in Cherry Hill, NJ, in which several hundred people were arrested and an abortuary closed for the day. In the four days of sit-ins in New York City, more than 1600 protestors were arrested. Several abortuaries were closed for the day during the operation.

* * *

Many of those new to the pro-life movement believe Operation Rescue sprang up out of thin air. Nothing could be further from the truth. Years of laying the groundwork for such an operation and planting the seeds of activism went into its success. Sit-ins, as rescue missions were formerly called, had taken place in cities throughout the country in the seventies and eighties.

* * *

The four activists organizations I have directed have all supported rescue missions.

* * *

The goal of Operation Rescue's organizers is to overwhelm the law enforcement system, and thereby gain free access to the clinics without legal consequences.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 35C: Letter to Editor, Milwaukee Sentinel, July 2, 1983]
(Excerpts)

The U.S. Supreme Court's June 15 ruling striking down restrictive abortion legislation in Ohio, Virginia and Missouri should make it clear to anti-abortionists that they can no longer put their trust in legislation or litigation, but must take their fight against abortion to the doors of abortion clinics.

* * *

Joseph M. Scheidler, Executive director of the Pro-Life Action League, Chicago

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 435A: Transcripts of Audiotapes]
(Excerpts)

* * *

Pro-Life Action News for Monday and Tuesday, June 24-25, 1991

The Pro-Life Action Network Convention in Wichita, KS last week was a roaring success. Nearly 200 activists attended sessions and workshops on Thursday and Friday and concluded with effective field training Saturday that closed all 3 Wichita abortion mills.

* * *

Pro-Life Action News for Monday and Tuesday, May 13-14, 1991

* * *

PLAN stands for Pro Life Action Network. PLAN began in Kansas City more than a decade ago when pro-lifers meeting for the National Right to Life convention there vowed that whenever pro-life activists gathered it would be difficult for local abortionists to perform their grisly, homicidal surgery if dicing of the human being can ever be considered surgery.

PLAN was formerly launched in Ft. Lauderdale, FL, and was designed to program activism for one year at a time. Out of PLAN grew Operation Rescue, pickets of abortionists homes, malpractice law suits against abortionist, the lock and block, and innumerable other non-violent but effective actions. Some of the great names of the activist movement first became recognized at PLAN gatherings such as Randall

Terry, Joseph Foreman, and Denny Hartford. Joan Andrews was an early member of PLAN as were Roy McMillan, Don Treshman, and many others.

* * *

Pro-Life Action News for Monday and Tuesday, July 22, 1991

* * *

Out in Wichita, KS a new Atlanta may be brewing. Reports we've been getting say that all 3 Wichita abortuaries were closed for a whole week while pro-lifers were there and they now plan to stay on. Also, in Fargo, ND, it's focus on Fargo concentrating on the lone abortion mill in that state. Pro life leaders are inviting activists to visit both cities. See you there.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 628: Letter from Joseph M. Scheidler attaching answers to written questions to Ms. Magazine.]
(Excerpts)

PRO-LIFE ACTION LEAGUE

January 15, 1983
Ms. Magazine Corp.
370 Lexington Avenue
New York, NY 10017
Attn: Features Editor

* * *

[Question, p. 7]

6. Describe the main activities of your group?

I consider some of my main activities organizing protests, demonstrations, sidewalk counseling at the clinics, occasional sit-ins, blitzes, leafleting heavily populated areas

* * *

7. What are your goals now? Long term. Short Term?

Long term goal is to stop abortion, make it illegal. Short term is to stop abortion in every way possible until we have it outlawed

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 674: Letter from Joseph M. Scheidler to Joseph P. Wall on April 29, 1986]
(Excerpts)

PRO-LIFE ACTION LEAGUE
Joseph M. Scheidler, Director, 6160 N. Cicero Ave., Chicago, IL 60646,
Office (312) 777-2900 Newsline (312) 777-2525

April 29, 1986

Joseph P. Wall
407 Unruh Avenue
Philadelphia, PA 19111

Dear Joe:

* * *

Joe, you would have loved our action in Pensacola the week of March 25. Joan Andrews was superb and really put the old aborters out of business for a spell.

* * *

Regards,

Joseph M. Scheidler
Executive Director

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 726: Article in Pro-Life Action News]
(Excerpts)

* * *

Pro-Life Activists call for Christmas Truce Dec. 28th

In compliance with an agreement made by more than one-hundred pro-life activists at the second National Activist Convention, in April, 1985, PLAN (Pro-Life Action Network) will call for a Christmas Truce on Saturday, December 28th 1985.

This truce will be based on a demand that all abortions cease everywhere on the Feast of the Holy Innocents, Dec. 28th

* * *

Pro-lifers will notify local abortuaries that they should do no abortions on this day (or if abortions are not performed on Saturday, the next nearest date) in compliance with the call for a Day of Amnesty for the Unborn. If they plan to comply with the national program they will indicate this on their telephone with a message saying that abortions will not be performed on Saturday, Dec. 28th.

If they comply, pro-lifers will go to the clinic to make certain no abortions are being performed. If the clinic is in compliance there will be no further action at that time. If, however, the abortuary is open for business, pro-lifers will take whatever non-violent direct action is necessary to stop abortions, including entering the abortuary, sitting in, blocking the entrance or blocking passages leading to the abortion chambers.

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 729: Letter from Joseph M. Scheidler to Administrator, Planned Parenthood on December 20, 1985]

PRO-LIFE ACTION LEAGUE
Joseph M. Scheidler, Director, 6160 N. Cicero Ave., Chicago, IL 60646, Office (312) 777-2900, Newsline (312) 777-2525

December 20, 1985

Administrator
PLANNED PARENTHOOD
17 N. State St.
Chicago, IL 60602

Dear Sir,

During this Holiday Season when people focus on family, children and one another, the grim reality of abortion hovers over the nation like an unholy spector.

In deference to this holy time, while we fully realize that abortion is always a tragedy even to those who support it, the Pro-Life Action Network (PLAN) is asking all doctors, clinics and hospitals nationwide to refrain from performing abortions on Saturday, December 28, the Feast of the Holy Innocents.

We are calling for a Christmas Truce. Even though there is a fundamental difference of thought between the pro-life and pro-abortion camps, we trust that you will agree to halt all abortions for at least one day.

The Pro-Life Action Network trusts that you will respect this "National Day of Amnesty." If you choose to ignore our request we will take note of your decision and will address this problem through non-violent direct action.

During this holy season, for the sake of women and children and all of us, please schedule no abortions for December 28. We will call to confirm your decision. Many throughout the country are complying with this request.

Respectfully in Life,

Joseph M. Scheidler
Executive Director

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Plaintiffs' Exhibit 801: Joseph M. Scheidler's Typescript for ACTION NEWS]
(Excerpts)

* * *

Action News WED and THURS, Jan. [illegible]

Pro-life Action News for Wednesday and Thursday, January 8 and 9.

* * *

Scheidler has picketed Hern's Clinic twice in recent months and Thursday repeated his threat to close Hern's Clinic. Disruptive activities, he said, are planned for Hern's business. In Ju [sic] when both the National Right to Life Committee and the National Organization for Women will be holding conventions in Denver. "We're going to have a virtual army out there," Scheidler vowed. "I'm not talking about the moder[ate]. I'm talking about the hard core activists for whom the abortion clinic door means nothing. I would suggest strongly that HRN [sic] stay up at his house in the mojntains [sic], or else take a vacation. That's a promise. If he sees it as threat, that's fine."

* * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Trial Testimony Excerpts]

SUSAN HILL
DIRECT EXAMINATION

* * *

[662]

* * *

A. Yes. As I have indicated earlier, I have been working in this field providing abortion services since 1973. In 1985 we started to have actions directed against us that I became alarmed about, and I was concerned about the ramifications of those actions. The first action that alarmed me to a more than normal things that happened with us was an invasion of our Delaware facility by Joan Andrews and 19 other people acting in concert with her.

[663] She entered the facility and – Miss Andrews entered the facility, the people acting with her, the invaders with her forcibly made their way to the back of the clinic and destroyed the medical equipment, chained themselves to medical and operating room tables. Went into the operating rooms while staff and patients were in the operating rooms, tore down the cabinets, threw out medications, destroyed medications that were sitting waiting for patients on the floor and then sat down and started chanting and yelling at the staff and the patients.

* * *

A. * * * Within the next year Mr. Joe Scheidler entered our building in Delaware, stormed up the steps with two or

three other men with him, came in and stormed his way into our administrator's office, said he was there to "case the [664] joint" and told her that she needed to find another job.

* * *

[698]

* * *

A. * * * There was a rescue in July of 1991 that began with, again, rescuers circling the building and coming around to try to get as close to the property as possible. There were police barricades at that point that were put in place to try to keep people off of the private property. A woman had come into the building posing as a patient, had said she was leaving the building to go get something out of her car, and then opened up the door and allowed and let in 23 other rescuers into the building themselves.

They came in and occupied the medical floor of the building. It's on two floors. They occupied it. There were [669] patients in the building as well as staff and physicians. They brought in metal pipes that were attached to 200-pound metal boxes and attached themselves so that it was impossible to pull them apart without using some kind of device that we obviously didn't have in the building itself.

To the best of my recollection, it took about four and a half hours for the police to remove the rescuers that had invaded the clinic, and I believe they had to get something that was like the jaws of life but smaller, which was able to pry open the metal boxes and release the rescuers so that they could be taken off. They resisted arrest and had to be carried off out of the building.

* * *

[725]

* * *

A. I have passed by peaceful picketers in front of our clinics since 1973, many times spoken to peaceful picketers, and actually even brought them food at times. We have obviously with what – the field that I work in, we have always

seen peaceful picketers in front of our different [726] clinics, and I believe that as long as they're peaceful and abide by the law, they should be able to picket peacefully on the sidewalks in front of our buildings.

Q. So you don't have any problems with peaceful picketing at all, do you?

A. No, we have never, ever brought an action against peaceful picketers in any one of our facilities or attempted to stop their ability to picket in front of our facilities.

Q. And, Ms. Hill, did the clinics in your group experience peaceful picketing in the Seventies and early 1980s?

A. Yes. Again, as I said, we had many peaceful picketers from religious groups, clergy and nuns in prayerful picketing. And again, we actually got to know some of them and, again, believe in their right to peacefully picket.

* * *

MS. A.

DIRECT EXAMINATION

* * *

[767]

* * *

A. * * * I had one daughter that was approximately three years old. I suffered two miscarriages, and I was pregnant again. We thought the pregnancy was going really well, and I was about five and a half, six months pregnant when I found out that the baby had hypertrophy of the left ventricle. In my situation, the child didn't have the left side of the heart formed. We were told that I would have to go to this children's hospital where they discovered this and that the baby would be hooked up on machines, and basically it would be a short life of suffering and pain. And personally my husband and I both felt that we couldn't do this to the baby, so we decided to opt for a different procedure.

Q. Were you an advocate of abortion at that time?

A. No, definitely not.

Q. Would you please tell us how you and your husband faced the decision that you had to make at that time?

A. It was a real difficult decision. By the time we went through all the different options, we decided to terminate the pregnancy.

Q. Would your baby have had any chance at all of surviving on its own?

A. No, definitely not.

* * *

[768]

* * *

A. * * * We got there when it was kind of dusk, and we drove by the clinic to see where we were going on our way to the hotel, and there were approximately a group of about 30 people that were in front of a gated area which I now know is the entrance. Some of them were chained to the fence, and other people were sitting directly in front of the gate, and then there were some people that were kind of milling around.

* * *

[770]

* * *

A. The next day, the staff called us and let us know that they were going – they arranged for a bunch of staff supporters and the staff themselves to bring enough cars to hold the people that were there to go to the clinic in, and they were directed to have us actually physically in the cars in front of the clinic before they could actually start arresting the Operation Rescue people and the other people that were there and get them, you know, away from the entrance so that we could gain access to it.

[771]

* * *

A. * * * There were hundreds of people all over the place. When we started to try to drive – excuse me – started

to try and drive up, people were surrounding our cars. They were screaming at us and banging at the windows. Some people were trying to lie down in front of the cars to stop the cars from moving. There were a lot of women and children there. At one point, there was this one lady who was pushing her young boy down in front of our car, trying to get our car to stop. We were terrified, and it was very hostile. The people seemed very mean and angry and we were very [772] scared.

* * *

A. The first person I saw was Randall Terry. He was out kind of in front of the car and away, and he was kind of standing up on something. He had a bullhorn, and he was pointing and directing people. He had a crowd of people around him. He was pointing, and the people were coming and going and, I guess, doing whatever he was telling them to do.

* * *

[775]

* * *

Q. You finally got into the clinic on the third day, is that right?

A. Yes, ma'am.

Q. Okay. By the time you got in, had you had any physical contact with any of the blockaders?

A. On the third day, the federal marshals were called in, and they basically were the people that cleared the area for us to get in. They had a bunch of support people that kind of formed a human chain on both sides to get a little walkway to get us through the gate. I was really concerned about this [776] little girl that was with us, and I had brought along like a sweater or something because I was using that at one point to roll it up in the window so that she wouldn't have to look at a lot of the stuff that was going on. I put it over her, and I was trying to get her through the crowd of people grabbing at us and spitting at us and that sort of thing. At one point, this

lady grabbed my arm really hard, and she said: How could you kill your grandchild?

I finally pulled away from her, and she left a bruise on my arm. Then we finally did make it in.

* * *

MAUREEN BURKE
DIRECT EXAMINATION

* * *

[1006]

* * *

Q. How did you happen to come to be present at the blockade in June 1985?

A. There was a national anti-abortion conference going on in town at that time, and we received word that a clinic in the Washington area would be invaded.

* * *

[1007]

* * *

Q. And what did you see when you arrived?

A. It was all quiet when we arrived, but just a few moments after we did buses began to pull up and people began to pour out of the buses. A couple of people attempted to sort of rush into the clinic, but we were able to prevent them from doing so.

And then and more and more – hundreds – well, over a hundred people I'd say came off the buses and then began blockading the clinic, sort of lining up all in front of it to prevent anyone from getting in or out.

Q. How long was the clinic kept closed by the blockaders?

A. It was several hours.

Q. Where were you personally in relation to the blockaders?

A. I was actually pinned against the clinic. There was [1008] about a six or seven rows of people between me and the clinic all shoving.

Q. Did you say or do anything as you were standing there pinned against the clinic?

A. Yes. Several of us started yelling as loud as we could, please stop pushing. We're going to get hurt.

Q. Did you see any of the defendants participate in that blockade?

A. Yes, I did. I saw Mr. Scheidler there.

* * *

Q. Was Mr. Scheidler there at the blockade throughout the entire time it was in effect?

A. Yes, he was.

Q. And what did you see him doing?

A. He was directing. He had his bullhorn and was sort of pointing out to people where to go.

* * *

CATHY CONNER
DIRECT EXAMINATION

* * *

[1149]

* * *

A. * * * In June of 1985, June 15th, actually to be specific, we had a clinic invasion. 21 people stormed the clinic just after we opened that morning at about 9:00, went into all the rooms, sat down and basically invaded and would not leave.

* * *

[1150]

* * *

Q. Ms. Conner, besides occupying the rooms in the clinic, did the anti-abortion protestors who invaded the clinic do anything else?

A. They took apart surgical equipment. They contaminated surgical instruments that had been sterilized. They contaminated some of the medications that we had in the facility, as well as taking apart of sterile packs.

* * *

[1153]

* * *

Q. And what, if anything, did they say to you when you asked them to leave?

A. They ignored me. They obviously did not leave at that time, just continued to walk through. Mr. Scheidler did at one point say to me that he was there to case the place because it was his intention to close us down and make sure that Delaware became the first abortion-free state in the nation.

[1154] Q. And, Ms. Conner, what was your reaction to that invasion that day?

A. I felt very threatened. I was by myself. These four men walked in. As I said, I had heard about Mr. Scheidler. He's quite a large man, very tall man, very threatening, intimidating. I was frightened.

Q. And did Mr. Scheidler say anything else to you that in any way added to the fear you just expressed?

A. As they were leaving – and there was a stairway that – we were on the second floor, so there was a stairway that you had to go down in order to get out the front door. He was walking down the steps and said to me as he was leaving that I had better find myself a different job because I could be in big trouble.

Q. How did you take that statement?

A. I took it as a threat.

* * *

DIDO HASPER
DIRECT EXAMINATION

* * *

[1386]

* * *

Q. * * * During the blockade, did you see any of your clients try to get into the clinic?

A. Yes, I did. I saw two different clients try to get into the clinic.

Q. Can you describe for the jury what you saw with respect to the first client?

A. Okay. The first client – for the most time, I was out in the street in front, and the first client tried to walk to the [1387] front door through all of the people who were blockading, right through them, make a path to the front door to go in the front door.

Q. What were the Operation Rescue people doing at this point?

A. Well, they were sitting there with their arms and legs sort of entwined, but they started yelling at her, and she was yelling back at them. Then they started grabbing her, actually just grabbing at her, and she ended up falling like right in the middle of them.

Q. What finally happened to her?

A. Police had to walk through the blockaders to be able to pick her up and carry her out.

Q. Did she ever make it into the clinic that day?

A. No, she didn't.

Q. Do you know why she was trying to get into the clinic?

A. Yes, I do. She was one of our fertility clients, and she was ovulating and was trying to get in for her insemination.

Q. Can you tell us about the second woman that you saw trying to get into the clinic through that blockade?

A. The second woman didn't try to get into the clinic. She was a client who had an ongoing health problem, and she had to be seen. The doctor only came once or twice a week to our clinic, and she needed to be seen by our physician. So she asked the police, and this was relatively early in the day. She asked the police to help her go through the side, the [1388] fence or barrier people on the south side of the clinic, and two policemen tried to help escort her through. When they couldn't escort her through, they tried to help her get over, and there were clinic staff on the other side to try to help her get over them.

Q. Were the police able to lift her over the blockaders?

A. No, and it was one of those moments that was very scary, because the police were very intent on trying to get this woman in and the blockaders were very intent on keeping her out. Once again, they grabbed her and pulled her to the ground.

* * *

PENNY BERTSCH
DIRECT EXAMINATION

* * *

[1443]

* * *

Q. What happened next?

A. They were rushing. They were walking very quickly, kind of rushing. And they all came in front of the door in front of us, linked their arms together, smashed together as closely as they could get together and smashed against us [1444] all the way across the sidewalk, which is about 12 feet from the door to the sidewalk and in both directions in front of the building. And they were all together so that no one could get into or out of the clinic from that – from the street.

Q. Were they touching you at this point?

A. Yes, I mean, they rushed. They were like shoving and elbowing and smashing.

* * *

Q. Did you say anything to these people who were smashing up against you?

[1445] A. Yes, You know, I told them you're smashing us. We're smashed. We're scared. Let us out of here, you know.

Q. Did they let you out?

A. No. They – you could hear people talking. Don't pay any attention to them. They're the murderers. They're the baby killers. Whatever happens to them is God's will.

* * *

LINDA TAGGERT

DIRECT EXAMINATION

* * *

[1470]

* * *

Q. Would you please tell the jury what happened after you saw Joe Scheidler with the bullhorn.

A. I was in the sort of foyer of the building and one of – in fact, the president of the local NOW chapter had come inside to talk to me. We had the door locked, and we were talking about what was going on, and she had also had some photographs that she wanted me to see and they were outside. So she started to open the door, and it was yanked away from her and she went flying.

And the first person that I recall coming in the door was Karisa Epperly who knocked me down on the stairs. I hit my head on the stairs. I was standing with my back to the stairs. And unfortunately both Georgia and I got up.

Q. Georgia was the NOW leader?

A. Right.

[1471]

* * *

A. And while I was still down, a couple of other women went by me who I did not know at the time but identified later as Joan Andrews and Sarah Burt. And then John Burt came in the door. He elbowed Georgia very hard. And then when I was in the way, he took his right arm and knocked me into the wall. My ear hit the wall, and my neck went over the banister, and I was down again.

* * *

* * * the C2 and C6 disks were severely damaged.

Did you require any treatment?

A. I had a Thompson collar for several months. I also was in physical therapy for about six months.

* * *

JOHN BURT

(DEPOSITION READ INTO THE RECORD)

DIRECT EXAMINATION

* * *

[1509]

* * *

Q. The next day, when did the demonstration at the Ladies Center begin?

A. Approximately 7:30 or 8:00 o'clock.

* * *

Q. Did you or Joan Andrews or her daughter or Kris Epperly destroy any properly while you were in the Ladies Center?

A. My daughter and Ms. Epperly did. Joannie tried to pull the plug off the suction curettage machine, and they had me handcuffed before I got to the top of the stairs.

Q. And did he" – and this is referring to Joe Scheidler – "say anything when he saw that night in jail along the lines of good job or glad you were able to do it?

A. Yeah, sure, they do. Hey, John, how you doing."

* * *

[1510]

* * *

Q. * * * Did Scheidler say thing to you that night?

A. Patted me on the shoulder, said hey, good job, John.

* * *

THIRD ANONYMOUS WITNESS
DIRECT EXAMINATION

[1514]

* * *

Q. What was the purpose of the surgeries that you had been going through at the time in 1989?

A. We were trying to save my reproductive organs. I had cystic ovaries, so I had a multitude of surgeries, and eventually I had a partial hysterectomy.

* * *

[1515]

* * *

Q. Would you please tell us what your physical condition was on that day, February 11th?

A. I was very weak. I had just major surgery two weeks prior to that day. There was still some slight bleeding. I was medicated, and I was in a lot of pain.

Q. And did you have an appointment to receive some medical care on that day?

A. Yes, I did.

Q. What was your appointment for?

A. My appointment was after the surgery follow-up. The doctors needed to check the incision and to check for bleeding and drainage.

Q. Where were you going to go for your appointment that day?

A. At the medical – the Women's Medical Center – Women's Medical Clinic in Los Angeles.

* * *

[1518]

* * *

Q. What happened as you were leaning against the car there in the parking lot by the clinic?

A. All of a sudden, a crowd of people came running from both sides of the building toward the parking lot, toward us. I didn't know who they were or what they wanted. They just rushed up on us so fast. I noticed that some of the people were carrying posters, at least I thought they were posters, and they were carrying signs and were shouting things at us. They were shouting "murderer, baby murderer."

I remember a gentleman walked up to me and Pops and asked was I going in the clinic, and I was shaking my head yes, and Pops was telling him that I was sick. Then another [1519] gentleman that was three or four people behind the first gentlemen yelled, "Nobody's going to get in this clinic, not today."

Then right about that time, somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of those people, and they were grabbing arms and grabbing at me. I didn't know what was happening, and I was yelling for Pops to help me. Then Pops was pushing the people away, and they were fighting Pops.

I was trying to move, but I was in between the open door. Then I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled "Oh, God help me," a man hit me in the head with a big old sign. It was at this point that I grabbed Pops' arm and Pops grabbed me, and I put my arms around Pops' waist. Then Pops was pushing the people away, and they were still grabbing and pulling at me.

Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling things like "murderer." I wondered: Who did I kill? Who did I hurt?

As I remember going down, Pops grabbed me by my waist, and the last thing I remember I just saw feet. Then I passed out.

* * *

LT. CARL PRYDUM
DIRECT EXAMINATION

* * *

[1573]

* * *

Q. What's your present occupation, sir?

A. Police officer, City of Atlanta.

Q. And what's your rank?

A. Lieutenant.

* * *

[1575]

* * *

Q. And when you use the word "blockade," sir, could you describe to the ladies and gentlemen of the jury briefly what you mean by "blockade"?

A. Large groups of people coming to the clinic sites, entering onto the property, using their bodies to block the doors, the driveways, access to the property. They use a variety of means, interlocking their bodies together, and from [1576] time to time we saw the use of vehicles to block vehicular access.

* * *

Q. Turning your attention back to the blockades, do you know what group was responsible for the blockades?

A. Operation Rescue.

* * *

[1596]

* * *

Q. I think I asked you to turn your attention, sir, to August 15, 1988. Can you tell us what happened that day.

A. Well, on that day, there was a protest at the Feminist Women's Center over on 14th Street, and a number of persons had appeared again from Operation Rescue and started blocking access to the property. I gave them formal official notice, which they refused to adhere to. Then as employees and patients were attempting to enter the property, myself and the other supervisor on the scene determined a point in their line that we were going to break, and we told both individuals at that time: Either unlock your arms or we're going to unlock them for you.

[1597] Then we successfully unlocked their arms, and we created a space between myself and the other sergeant for people to pass between. In the process of doing that, I had my back turned to a gentleman who was later identified to me as Mr. Metcalf, and Mr. Metcalf in a very forceful manner, after I had dislodged him and created this space, in a very forceful manner he struck me in the back of my rib cage with his elbow.

* * *

TIMOTHY MURPHY
DIRECT EXAMINATION

* * *

[2316]

* * *

Q. Now, the cement block was placed in such a way that the Park Med Clinic door could not be opened, correct?

A. That is correct.

* * *

Q. That's another shot of you locked in front of the Park Med door so nobody could get in?

A. That's correct, yes.

* * *

[2333]

* * *

Q. And you wrote this article, correct?

A. I did.

Q. The facts in your article are accurate?

A. Yes, they are –

* * *

A. * * * By Tim Murphy. Pro-Life Action League. "The first major rescue following the election of Bill Clinton took place Saturday, November 7, in Chicago, targeting the Albany Medical [2334] Surgical Center."

* * *

A. "108 rescuers were arrested after successfully shutting down Albany for over two and a half hours."

"Later in the morning a lock and block team struck at Central Medical Pan-Americano, a doctor's office where abortions are performed, closing it for the entire day."

* * *

A. "Over 200 pro-life college students from a number of colleges took part with 25 being arrested for the first time."

* * *

"Arriving at 5:45 a.m. the rescuers and prayer supporters exited the vehicles and took up positions in front of the three [2335] doors and at the front sidewalk and rear driveway entrances to the parking lot."

"Rescuers Tim Gilliam and Randy Means locked themselves together by inserting their arms in a long pipe positioned between two fence posts adjacent to the driveway. Four other rescuers with four to five kryptonite locks attached themselves to each other by their ankles and stretched out across the driveway with one man connected to Gilliam. A line of rescuers stood in front and behind them to ensure their protection.

"Only three escorts and a security guard were inside the parking lot when the rescuers arrived, catching police and abortion advocates completely off guard. The guard had parked his van inside the parking lot at the door blocking the main entrance to the building. Immediately Bob Rothlisberger and another pro-lifer locked themselves to the underside of the van by a pole similar to the one used by Gilliam and Means.

"Soon a squad car arrived and a policewoman unsuccessfully attempted to push her way through the pro-lifers blocking the driveway."

Q. Then on the next page, sir.

A. "City workers and police set up barricades on either side of the front door gates and across the street to contain the crowd forming there. Meanwhile the pro-lifers continued to block the driveway and parking lot even after being forced away [2336] from the front door, denying Albany the use of their parking lot."

* * *

A. "The Chicago Fire Department was called and used torches to cut up Albany's fence to remove Gilliam and Means. The fortified kryptonite locks were cut off rescuers by firemen using the jaws of life.

* * *

JOSEPH SCHEIDLER
CROSS EXAMINATION

* * *

[3940]

* * *

Q. Going on with your book, turning to page 144, you recommend [3941] right here in your book blocking the procedure rooms, don't you?

A. Yes. That was one way.

* * *

Q. You say when you block the procedure room, that's not forceful?

A. No. Sitting down is not forcible.

Q. When you prevent people from coming in?

A. Yes.

Q. You also recommend lock and blocks. If you turn to the previous page, 142 and 143, you've recommended that tactic right here in your book?

A. Yes. It's very effective.

* * *

Q. You consider lock and blocks aren't forcible either?

A. No.

* * *

[4001]

* * *

Q. And in this letter you wrote to another supporter, thanking that individual for sending photographs of "our gang" in front of what you call the bombed out abortuary, and then you say "great scene." Those are your words, aren't they, Mr. Scheidler?

A. Yes, I wrote those. In context they're true.

Q. And the supporter who wrote the letter to you attaching those photographs referred to the picture in the photographs as – can you read it here – "the freshly gutted clinic." Do you see that?

A. Yes

Q. That was his expression, right?

A. Yes, that was his expression.

[4006]

* * *

Q. One of the things that was agreed to at this meeting was to call the group PLAN, Pro-Life Action Network, right?

A. Yes, We've been through that.

Q. Okay. And another thing that was agreed to was to create a year of pain and fear for the abortion industry; isn't that right?

A. That was on a press release that was put out, yes.

* * *

[4007]

* * *

Q. Now, another thing that was talked about at this PLAN meeting was whether or not to tell clinics at Christmastime to close or be closed, right?

A. It was an amnesty, yes.

Q. In fact, this was agreed to by the people at the PLAN meeting; isn't that a fact, Mr. Scheidler?

A. I believe that was.

Q. And you called it the Christmas truce, right?

A. That's right.

Q. And you talked about how each person was supposed to go back to their own communities and tell the clinics that provided medical services that included abortion that they [4008] should either close or they would be closed by whatever what you call nonviolent direct action was necessary, including sit-ins, blocking the entrance or blocking passages to the procedure rooms, right?

A. That well could be.

* * *

Q. * * * And then you talk about how if they don't voluntarily close further action will be taken, including entering the clinic, sitting in, blocking the entrance of blocking passages, right?

A. Yes.

* * *

[4009]

* * *

Q. And in furtherance of that agreement your league, your Pro-Life Action League actually sent out letters to every single clinic in the Chicago area that provided abortions, right?

A. We tried to.

* * *

Q. And they essentially tell you that – and let's put one on the ELMO here – that PLAN, the Pro-Life Action Network is asking all doctors, clinics, et cetera, to refrain from abortions on that day. It's called a Christmas truce. And it says here, "The Pro-Life Action Network trusts you will respect this, and if you choose to ignore our request, we will take note of your decision and will address this problem through nonviolent direct action." You wrote that, right?

A. Yes.

Q. And, of course, the nonviolent direction action you're talking about is blocking the entrances or sitting in or [4010] blocking the procedure rooms as you referred to in the earlier document, right?

A. Yes.

* * *

[4012] Q. * * * On direct examination you talked about the incident in Pensacola in March of 1986. Do you recall that?

A. Yes.

Q. You went down there at the invitation of John Burt, right?

A. Yes.

* * *

[4021]

* * *

Q. And, in fact, on direct examination I believe that you said that Joan Andrews had reminisced about some of the things she did, is that right?

A. Yes.

Q. And, in fact, one of the things she reminisced about was how she had dismantled suction machines in other clinics before this occasion, right?

A. Something to that effect, yes.

[4022]

* * *

Q. And you actually saw Joan Andrews and John Burt enter the clinic, didn't you, Mr. Scheidler?

A. I believe I did. It was really fast.

* * *

Q. And when you visited them in jail, they told you that they had trashed the clinic, didn't they?

A. I believe that's when it came out.

* * *

[4121]

* * *

Q. * * * [F]ocusing on this incident at the Lake Forest Oasis in 1991, Matt Trewhella's group surrounded the doctor's car and wouldn't let it go, right?

[4122] A. I think that's how they did it.

Q. And it took about – there were about 30 or 40 protesters in that group that were surrounding the car, correct?

A. Well, surrounding it, I don't think there were that many, but there were about that many there.

Q. And this group prevented the doctor from getting into his car for a good hour, isn't that right?

A I think it was an hour, yes.

Q. And you applauded that tactic and said you'd probably made it a new chapter in the next edition of your book, didn't you?

A. I remember saying that.

* * *

JOSEPH SCHEIDLER
RE-CROSS EXAMINATION

* * *

[4256]

* * *

Q. Dobbs Ferry 1991, you were there during those rescues, weren't you?

A. Yes.

Q. Clinics were closed forcibly, weren't they?

A. Yes.

* * *

(35) (31)

FILED
OCT 18 200
OFFICE OF THE CLERK

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*, *Respondents.*

OPERATION RESCUE, *Petitioner,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*, *Respondents.*

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER OPERATION RESCUE

WALTER M. WEBER
LARRY L. CRAIN
DAVID A. CORTMAN
ROBERT W. ASH
AMERICAN CENTER FOR LAW & JUSTICE
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

THOMAS P. MONAGHAN
CHARLES E. RICE
CENTER FOR LAW AND JUSTICE INTERNATIONAL
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

JAY ALAN SEKULOW
Counsel of Record
COLBY M. MAY
STUART J. ROTH
JAMES M. HENDERSON, SR.
VINCENT P. MCCARTHY
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for Operation Rescue, Petitioner in No. 01-1119

29 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ABBREVIATIONS KEY vi

RESPONSE TO NOW'S STATEMENT 1

ARGUMENT 4

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF 4

A. NOW Ignores the Text and Structure of § 1964 5

B. NOW Has No Persuasive Answer to the Antitrust Analogy 6

C. The "Inherent Equitable Power of Courts" is Not a License to Disregard Congressional Selection of Remedies 7

D. Policy Judgments are for Congress, Not Courts 9

II. NOW HAS ABANDONED THE THEORY ON WHICH THE JUDGMENT BELOW RESTS 10

A. NOW Concedes that Nonviolent Sit-ins are Not Extortion 10

B. NOW Concedes that Liberty Interests are Not Extortable "Property" 11

C. NOW Concedes that Impairment of Property is Not "Obtaining Property" 13

D. NOW's Substitute Theory of Violence-Used-to-Control-Assets Cannot Salvage the Judgment 14

E. NOW's Expansive Definition of "Property" Cannot Salvage the Judgment 16

F. NOW's Other Extortion Arguments are Meritless 18

CONCLUSION 20

APPENDIX: 116 Cong. Rec. 35,346-47 (excerpt) 1a

TABLE OF AUTHORITIES

Page

CASES

Califano v. Yamasaki, 442 U.S. 682 (1979) 7, 8

California v. Sierra Club, 451 U.S. 287 (1981) 10

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 8

Evans v. United States, 504 U.S. 255 (1992) 13

Franklin v. Gwinett County Public Schools, 503 U.S. 60 (1992) 8

Grupo Mexicano de Desarollo v. Alliance Bond Fund, 527 U.S. 308 (1999) 10

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 6

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8

Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) . 6, 7, 9

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) 9

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1992) 3, 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 3

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 7, 8

Pennsylvania Bureau of Corrections v. United States Marshal Serv., 474 U.S. 34 (1985) 8

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 6

United States v. Nardello, 393 U.S. 286 (1969) 19

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert denied*, 397 U.S. 1021 (1970) 17

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. I, § 8, cl. 3 19

U.S. Const. amend. I 3, 4

18 U.S.C. § 248 ..... 9, 10

18 U.S.C. § 1951 ..... 1, *passim*

18 U.S.C. § 1952 20

18 U.S.C. § 1964 ..... 4, *passim*

Rule 60(b), Fed. R. Civ. P. 3

OTHER AUTHORITIES

1995 Clinic Violence Survey Report, Feminist Majority Foundation 10

116 Cong. Rec. 35,346-47 (1970) 4, 5

Oestreicher, *Scheidler Meets Morrison (at the Entrance) to a Health Clinic*, 35 Creighton L. Rev. 693 (2002) .. 19

J. Scheidler, *Closed: 99 Ways to Stop Abortion* (revised ed. 1993) 1

United States Accounting Office, *Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act* (GAO/GGD-99-2) (Nov. 1998) 10

ABBREVIATIONS KEY

App.	Appendix
Br.	Brief
Cal.	States of California et al. (amici)
CIR	Center for Individual Rights (amicus)
DX	Defense Exhibit
FACE	Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248)
JA	Joint Appendix
LLDF	Life Legal Defense Foundation (amicus)
NACDL	National Association of Criminal Defense Lawyers (amicus)
NOW	Respondents National Organization for Women, Inc., et al.
NYCDL	New York Council of Defense Lawyers (amicus)
Opp.	Brief in Opposition
OR	Petitioner Operation Rescue (No. 01-1119)

PA	Plaintiffs' Appendix in the Seventh Circuit
Pet.	Petition for Writ of Certiorari
PX	Plaintiffs' Exhibit
RA	Appendix to OR's Reply to Brief in Opposition (No. 01-1119)
RCRC	Religious Coalition for Reproductive Choice, et al. (amici)
RICO	Racketeer Influenced and Corrupt Organizations Act
Sch.	Petitioners Joseph Scheidler, *et al.* (No. 01-1118)
SSA	Scheidler Defendants' Supplemental Appendix in the Seventh Circuit
Tr.	Transcript of Trial

The core issues in this case are: first, whether private parties can obtain equitable relief under civil RICO; and second, whether a nonviolent protest sit-in, conducted without any attempt to obtain property, qualifies as predicate extortion under the Hobbs Act. The Seventh Circuit answered both these questions incorrectly and must be reversed. *See* OR Br.

RESPONSE TO NOW'S STATEMENT

The bulk of the evidence in this case addressed the pro-life sit-in movement of the late 1980's and early 1990's. This nationwide "rescue" movement involved thousands of people from all walks of life. Tr. 453, 1614. The movement was remarkable for its nonviolence: the jury here found only four acts *or* threats of violence against persons *or* property in over fourteen years of protests by thousands of people. *See* OR Br. at 5 n.10, 32 n.34. *See also* PA 103, 108, 114, 117, 128, 132, 138, 145, 150-51, 222, 332 (photos of "rescues"). A "violent" or "extremist" movement could never have had such drawing power or have maintained such an impressive absence of violent incidents.

While respondents NOW et al. ("NOW") refer to "121 predicate crimes," NOW Br. at 1, 3 & n.4, this inflated figure reflects quintuple counting. OR Br. at 5 n.9. As NOW concedes, the jury actually found only 25 nonviolent sit-ins[1]

---

[1]NOW invokes Question 6 on the verdict form, OR Pet. App. 312a, as proving that none of the predicate acts were "mere" sit-ins. NOW Br. at 3, 50. NOW is mistaken. OR Br. at 4 n.8. In NOW's view, moreover, *no* sit-in is peaceful unless the participants "part like the Red Sea" whenever anyone wishes to pass. RA 27-28 (closing argument).

NOW refers some sixteen times in its brief to "blitzes" (or "blitzkrieg" tactics). Given that NOW used the term only once in its Seventh Circuit brief and thrice in its Brief in Opposition, this terminology *du jour* presumably reflects a desire to elicit an emotional response which will distract from the insubstantiality of NOW's legal claims. However, a "blitz" is *not* synonymous with a rescue sit-in. *See* J. Scheidler, *Closed: 99 Ways*

(continued...)

and four unidentified acts or threats of violence to any person or property. NOW Br. at 3 & n.4, 35 & n.45. *See* OR Br. at 4-5 & nn.7-10; OR Pet. App. 311a-12a.

NOW tries to paint pro-life rescuers as thugs and ruffians. NOW Br. at 2 & n.3. NOW's caricature bears scant resemblance to reality or to the record in this case, but rather represents an inflated portrayal of one side's testimony about isolated alleged incidents.

First, NOW relies on contested *evidence*, *not findings*.[2] NOW's allegations of violence were vigorously disputed at trial, and the jury plainly disbelieved most (possibly all) of NOW's more inflammatory factual allegations, *see* OR Br. at 5 n.10.[3]

---

[1](...continued)
to Stop Abortion, Ch. 57, "Conduct a Blitz" (revised ed. 1993), pp. 231-33 (DX-2) (a "blitz" is a brief visit to a clinic waiting room to converse and distribute literature).

[2]Space does not permit a response to all of NOW's distortions of the record. For example, NOW claims that it was "common" for "PLAN to apply so much force to bodies pinned against buildings that glass doors and windows were cracked or damaged," NOW Br. at 2. To support this astonishing claim, NOW offers four citations. The first two citations both refer to the same incident where a "little piece of rubber" supposedly "popped out" of a glass door. Tr. 1445. The third citation is to another single incident in which a plastic window allegedly "began" to "bend and buckle" when abortion personnel and protesters were physically pressing against each other. Tr. 4816, 4824-25. NOW's fourth citation is to an incident where *police*, not pro-lifers, cracked a glass door by pushing it. PX 3B, p. 3. Thus, this "common" phenomenon turns out to consist of two alleged incidents out of fourteen years of protests nationwide.

[3]NOW prominently features one anonymous witness's claim that she was beaten by protesters at a Los Angeles "rescue" sit-in. NOW Br. at 2. This witness's testimony was almost certainly fabricated and perjurious. *See* Tr. 1527, 1530-31; SSA at 1348-1409. *See also* Corrected Reply Brief for Defendant-Appellant Operation Rescue, *NOW v. Scheidler*, Nos. 99-3076 et al. (7th Cir. May 10, 2000), p. 5 & n.1, Addendum at 1a-8a. Indeed, (continued...)

More importantly, the jury, over defendants' objection, was not required to specify what unlawful acts it found. OR Pet. at 7 & n.12. There is thus no basis for crediting NOW's speculation as to the evidence underlying the verdict.

Second, the provability of these isolated (*see* OR Br. at 32 n.34) alleged instances of misconduct are irrelevant to the purely legal questions presented, OR Pet. at 2-4.

Third, NOW's reliance, NOW Br. at 4-6 & nn.7, 11, upon "highly charged political rhetoric," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1992), as a basis for liability in treble damages and injunctive restraints, is flatly inconsistent with the right to free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Claiborne*, 458 U.S. at 928.

Fourth, the evidentiary litany NOW provides actually highlights the essential need for (and absence here of) precise jury findings, meaningful First Amendment limitations on liability, and adherence to the statutory elements of Hobbs Act extortion, in the context of extensive, overwhelmingly

---

[3](...continued)
there was not a shred of testimony or evidence corroborating this anonymous witness's allegations of assault, despite the presence of crowds, numerous police, and media. Tr. 1342-44, 2941, 4642-46, 4695-99. *See also* SSA at 1364-92, 1406-08 (news coverage of the event).

The testimony of an employee about being "smashed" against the front doors of a building during a rescue, an incident NOW also features, NOW Br. at 2, appears quite false as well. Indeed, the opposite appears true: abortion facility agents physically abused the nonviolent sit-in participants. *See generally* Appendix in Support of Defendants' Motions to Dissolve the Injunction and Reopen the Court's Judgment under Fed. Civil Rules 60(b)(5)-(6), Vol. II, Tabs 18-29 (Dkt. 1462) (including declarations, photographs, and two videotapes of the "rescue" in question). (The petitioners' Rule 60(b) motions were not "denied as baseless," NOW Br. at 1 n.1. No court has so held, and NOW has never refuted petitioners' evidence that the challenged testimony was either mistaken or downright fabricated.)

nonviolent protest activities. This is a case *par excellence* of an attempt to impose *liability* -- strict liability at that -- *for association within a protest movement*. *None* of the named defendants was alleged to have committed the scattered incidents of physical abuse NOW recites, NOW Br. at 2 & n.3. Rather, nameless "PLAN members" -- NOW's code for any pro-life activist -- supposedly did it. NOW Br. at 2 & n.3, 5-6 & nn.9-10. NOW's (and the Seventh Circuit's) virtually limitless definition of "extortion" only aggravates this problem. Indeed, the notion that protest leaders should be held liable as felons and racketeers for incidents such as one woman's grabbing one person around the neck at one location during a large-scale demonstration, RA 6-10, or one man elbowing a policeman during a sit-in, RA 11-17, is astonishing. NOW's reliance on such incidents, Opp. at 2-3, despite their manifest insufficiency -- and unconstitutionality[4] -- as a basis for imposing associational liability, is quite telling.

ARGUMENT

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

The text and history[5] of RICO's civil remedies provision, 18

[4]The First Amendment does not tolerate imposing damages and injunctions against activists in a social movement, even leaders, merely because of what someone else supposedly did, especially when those misdeeds ran *contrary* to the leadership's directives. *Claiborne*, 458 U.S. at 925. *See* OR Br. at 2 (defendants embraced nonviolence; OR required pledge of nonviolence from "rescue" participants).

[5]The only legislative history NOW offers in support of its position is Representative Steiger's supposed statement that "[T]he bill as it now stands . . . may have this option [of equitable relief]." NOW Br. at 45 (purporting to quote 116 Cong. Rec. 35,347 (1970)). The only reason this stray statement appears even weakly to support NOW is because of the bracketed language NOW added. In its original context, Rep. Steiger was referring (continued...)

U.S.C. § 1964, demonstrates overwhelmingly that RICO does not authorize private injunctive relief.[6] OR Br. § I; U.S. Br. § I. Indeed, in RICO, Congress borrowed from antitrust law precisely the remedial language this Court had held *not* to authorize private injunctive relief; at the same time, Congress did *not* borrow a separate provision of antitrust law that *did* authorize private injunctions. OR Br. at 11-13, 21; U.S. Br. at 9-13. Faced with this compelling evidence, NOW offers no persuasive arguments to the contrary.

A. NOW Ignores the Text and Structure of § 1964.

NOW's tactic is to ignore the plain differences between § 1964(b) -- which gives the Attorney General unqualified authority to "institute proceedings under this section" -- and § 1964(c) -- which gives a private party "injured in his business or property" the right to "sue therefor . . . and . . . recover threefold the damages he sustains . . . ." While § 1964(b) gives

[5](...continued)
to the "option," not of obtaining *injunctions*, but of obtaining "proper redress." *See* OR Reply App. 1a (setting forth excerpt in context). Rep. Steiger, in the very next sentence, said he was "convinced" that the amendment he proposed, which authorized private injunctive relief, "will have the option," *id.* This statement makes perfect sense in reference to "proper redress" (a matter of opinion one can be "convinced" of), but makes no sense in reference to injunctive relief, which his (unsuccessful) amendment *explicitly* (not *arguably*) authorized. *See* 116 Cong. Rec. 35,346 (1970) (setting forth text of amendment). Moreover, NOW's reading of this isolated statement is impossible to reconcile with Rep. Steiger's own explicit public statements about the underlying bill's *failure* to provide for private equitable relief. OR Br. at 16-17.

[6]NOW repeats its claim that the Seventh Circuit was the first federal court of appeals to decide whether private parties could obtain permanent injunctive relief under RICO. NOW Br. at 36 & n.48. This is simply wrong. OR Reply to Opp. at 3-4 & n.5. Similarly erroneous is NOW's labelling as *dicta* the overwhelming consensus of lower courts against reading RICO to authorize private injunctive relief. *Id.* at 4 n.6.

an unqualified green light to the federal government to "institute proceedings," and thus to invoke the equitable relief specified in § 1964(a), the private treble damages provision of § 1964(c) does no such thing. Rather, it sets forth a private right to sue for a particular remedy, namely, treble damages. *See* OR Br. at 9-11, 20-23. The language and structure of § 1964(b) and § 1964(c) are distinct, not parallel.[7]

B. NOW Has No Persuasive Answer to the Antitrust Analogy.

NOW cannot deny that the Sherman and Clayton antitrust statutes served as the models for RICO's remedial sections. *See* OR Br. at 13. Instead, NOW takes mutually inconsistent tacks in an effort to minimize the analogy between antitrust and RICO remedies.

On the one hand, NOW denies that this Court ever held that private injunctive relief was unavailable under the Sherman Antitrust Act. Rather, NOW dismisses the pertinent decisions as turning on standing. NOW Br. at 41-42. This is simply inaccurate. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) ("We cannot suppose it was intended that the enforcement of the act should depend *in any degree* upon original suits in equity instituted by the states or *by individuals* to prevent violations of its provisions") (emphasis added);

[7]NOW relies (ironically) on the arguments of Professor G. Robert Blakey, former counsel for the Scheidler defendants. NOW Br. at 41 n.53, 43 n.55. The substance of those arguments is met in the petitioners' briefs. For a sharp critique of Blakey's analyses on this issue, *see Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983).

Quoting Blakey, NOW argues that to read the grant of a private treble damages action in RICO § 1964(c) not to include a grant of injunctive relief is to convert "addition" into "subtraction." NOW Br. at 41 n.53. But before § 1964(c) was added, there was no private remedy under RICO at all. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 486-87 (1985). One cannot "subtract" what was never there.

Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917) ("a private person cannot maintain a suit for an injunction under § 4 . . . even if . . . special damages [are] shown"). *See also* U.S. Br. at 10 & n.4 (listing additional cases).

On the other hand, NOW admits that this Court held that private injunctive relief is unavailable under the Sherman Act, NOW Br. at 42, but credits this to language making it the government's "duty" to institute proceedings, *id.* This argument suffers from two obvious defects. First, neither *Northern Securities* nor *Paine Lumber* used any such rationale for their holdings. And second, whether the government has the *duty* (as in the antitrust statutes) or merely the *power* (as in RICO) to "institute proceedings" is wholly irrelevant to the question whether *private parties* can obtain such relief.

NOW's essential position is facially implausible. NOW identifies as "important textual differences," NOW Br. at 42, such minutiae as use of the phrase "shall be the duty" as opposed to "may" (regarding the *government's* pursuit of equity relief), and the division *vel non* into separate subsections of provisions conferring jurisdiction and authorizing federal government pursuit of equitable relief. *Id.* Yet NOW finds no significance in the *inclusion* of a provision granting private equitable relief in the Clayton Act and the *omission* of precisely such a provision in RICO. *Id.* at 42-43. NOW has strained at gnats and swallowed the proverbial camel.

C. The "Inherent Equitable Power of Courts" is Not a License to Disregard Congressional Selection of Remedies.

Recognizing the weakness of its statutory construction arguments, NOW invokes the "inherent equitable powers," NOW Br. at 39, that courts have "'absent the clearest command to the contrary from Congress,'" *id.* at 36 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)) (brackets omitted). This argument, however, relies on statements torn out of context.

There are at least two separate strands of remedies jurisprudence in this Court. One strand -- the strand NOW invokes -- addresses those situations where a private right of action exists either expressly (as in *Califano*, 442 U.S. at 698 n.12 ("a party . . . may obtain a review of such a decision by a civil action") (quoting statute)) or by implication (as in *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (Title IX)), but no particular remedies are spelled out. The second strand -- which NOW largely ignores -- address those situations where, as with RICO, Congress *has* specified remedies, but a litigant wants *additional* remedies read into the statute. *See* OR Br. at 10-11 (listing cases). In this latter situation, the "carefully integrated civil enforcement provisions found in . . . the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). NOW's invocation of cases from the wrong line of authority is "inapposite," *Franklin*, 503 U.S. at 69 n.6 (distinguishing the lines of cases).[8] In reality, NOW is simply repeating a *dissenting* argument this Court already rejected in the context of the Sherman Act. *See Paine Lumber*, 244 U.S. at 473 (Pitney, J., dissenting) ("I dissent from the view that complainants cannot maintain a suit for an injunction, and I do

[8]The authorization of civil RICO remedies is not one of those "powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation marks and citations omitted). *See also Pennsylvania Bureau of Corrections v. United States Marshal Serv.*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling"). That RICO's remedies are in addition to remedies available under other sources of law, NOW Br. at 39, is irrelevant: here, the only remaining cause of action is civil RICO.

so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction . . . rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the [federal] courts . . .").

D. <u>Policy Judgments are for Congress, Not Courts.</u>

Finally, NOW offers various policy arguments for why private parties "need" equitable relief under RICO.[9]

There are weighty policy arguments *against* empowering private parties with injunctive relief under RICO as well. *See* OR Br. at 24; U.S. Br. at 14-15; LLDF Br. at 6-12. *Cf. Minnesota v. Northern Sec.*, 194 U.S. at 171 (reserving injunctive relief to Attorney General ensures "uniform plan" of equitable enforcement).[10]

The injunction in the present case perfectly illustrates the abuse that can result from private pursuit of RICO injunctions: rather than enjoining violations of RICO, *cf.* 18 U.S.C. § 1964(a), this injunction enjoins such things as trespass, vandalism, and obstruction, OR Pet. App. 270a-271a.

But the short answer is that policy considerations are for

[9]Belying the supposed need for an injunction here, NOW never requested a preliminary injunction despite the twelve years this case took to get to trial, and NOW has taken no enforcement action since the permanent injunction issued, NOW Br. at 12. NOW conceded there is little practical need for RICO injunctions against abortion protests because "FACE provides broad relief and is simpler to navigate." Opp. at 15. *See also* LLDF Br. § III (documenting countless injunctions already issued locally).

[10]Moreover, there is no special *need* for RICO injunctions, given the wealth of alternative state and federal sources for injunctive relief in the average case. Ironically, even NOW's amicus Motorola does not need injunctive relief under RICO. *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243 (S.D.N.Y. 2002) ("Motorola has an independent entitlement to injunctive relief under its state law claims"). The court in that case only reached the issue of equitable relief under RICO because Motorola's co-plaintiff, Nokia, failed to bring a claim under any other law. *Id.*

legislatures, not courts. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).[11] "The debate concerning this formidable power . . . should be conducted and resolved where such issues belong in our democracy: in the Congress." *Grupo Mexicano de Desarollo v. Alliance Bond Fund*, 527 U.S. 308, 329 (1999).

II. NOW HAS ABANDONED THE THEORY ON WHICH THE JUDGMENT BELOW RESTS.

NOW has apparently lost confidence in its own arguments, as NOW distances itself from the theory NOW took to the jury and convinced the Seventh Circuit to embrace. But NOW cannot substitute a new theory *post hoc* in order to salvage a jury verdict rendered and affirmed on a different theory.

A. NOW Concedes that Nonviolent Sit-ins are Not Extortion.

For the first time, NOW concedes that a nonviolent sit-in

[11]NOW credits the injunction in this case with having had salutary effects. NOW Br. at 1, 10. This assertion is without record support and is in any event quite irrelevant to the question whether injunctions are available to private parties under RICO. To the extent NOW would have this Court believe the injunction in this case put a halt to the national rescue movement, the clear indications are that it was the enactment in 1994 of FACE, 18 U.S.C. § 248 -- which made nonviolent pro-life sit-ins a federal crime -- that shut down the rescue movement. *See* United States General Accounting Office, *Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act* (GAO/GGD-99-2) (Nov. 1998); *1995 Clinic Violence Survey Report*, Feminist Majority Foundation, Chart 5 (reproduced at p. 9a of App. A to Amicus Brief of Feminist Majority Foundation in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065 (O.T. 1995) [FMF *Schenck* Br.]). (Indicative of the mindset of groups like NOW and FMF, the FMF report lists as "violence" not only pro-life rescues -- which it labels "blockades" or "invasions" -- but also "home picketing," FMF *Schenck* Br. at 2a, and even littering, *id.* at 7a ("disposal of trash on clinic property"). *See* OR Br. at 2 n.2.)

does not constitute extortion. NOW Br. at 3 n.5.[12] Contrary to NOW's insinuation that this concession is nothing new, *id.* (citing single ambiguous statement made at conference outside presence of jury), NOW's Johnny-come-lately admission conflicts directly with NOW's trial theory, which was that *any* interference with access to abortion qualified as extortion and racketeering. *See* OR Br. at 4 & n.7, 26 (citing transcript); OR Reply to Opp. at 1 n.1; RA 27-28. The Seventh Circuit, like the district court, affirmed this same expansive theory of extortion. OR Br. at 26, 29. NOW's concession, coupled with the jury's finding that most or possibly all of the sit-ins were nonviolent, OR Br. at 4 n.8, is tantamount to a concession that the jury verdict and judgment must be overturned.

B. NOW Concedes that Liberty Interests are Not Extortable "Property",

NOW concedes for the first time that liberty interests do not qualify as "property" for purposes of an extortionate "obtaining of property." NOW Br. at 13. *Accord* OR Br. at 39-42.[13] This concession also dooms both the judgment below and the underlying jury verdict. The jury was instructed that "property

[12]NOW's own amici make this same concession. Cal. Br. at 8-9; Lawyers' Committee Br. at 1-2. *See also* RCRC Br. at 2 (peaceful civil disobedience "fundamental" to ethic of religious liberty); NARAL Br. at 7 (noting "our nation's long and proud history of civil disobedience").

[13]*See also* NYCDL Br. at 15:

> [A] woman's right of access to abortion services . . . cannot be "property" within the meaning of the Hobbs Act, any more than marrying a wealthy woman is "a source or element of wealth" for purposes of the Hobbs Act. Certainly no one would suggest that interference with or the prevention of such a marriage by the family of the woman could constitute obtaining property from a fortune-seeking spouse within the meaning of the Act. Interference with abortion rights . . . is, if anything, an even more attenuated or indirect "source or element of wealth."

rights" included such liberty interests as the "right to seek medical services," the "right . . . to perform [one's] job," and the "right . . . to provide medical services free from wrongful threats, violence, coercion and fear." JA 136. NOW argued that precisely such liberty interests were "extorted," Tr. 567 (opening statement),[14] and the Seventh Circuit rejected petitioner's contention that these liberty interests were not "property," OR Pet. App. 35a-36a. NOW's belated concession therefore requires reversal.

The United States as amicus defends as "property" only "the exclusive right to control the conduct of the business's operations," U.S. Br. at 23. Petitioners obtained no such "exclusive right of control" here. Moreover, the United States errs by equating such a right with the third liberty interest listed in the jury instruction. *Infra* p. 18.

The United States does *not* defend the first two parts of the "property" instruction, U.S. Br. at 15 n.6, which is presumably why the United States urges affirmance of a "holding" and not a "judgment," *id.* at 30. The defectiveness of the first two liberty interests, implicitly acknowledged by the United States, requires reversal even if the liberty interest in providing services "free from wrongful threats, violence, coercion and

[14]*See also* Tr. 4987 (closing argument) ("Property rights include a woman's right to choose what to do when faced with an unplanned pregnancy"). NOW tries to dismiss such language as "simply surplusage," NOW Br. at 15 n.16, insisting that what really mattered was the patients' "contracts for medical services," *id.* at 4; *see also id.* at 10 ("fruits of their contracts"), 15 n.16 ("their contracts to exchange money for medical services"). But the jury was not instructed that it must first find the existence of a contract in order to find petitioners liable for extortion. NOW's contract theory is freshly concocted. Moreover, a holding that interference with contracts (which typically will entail "fear" of "economic injury" to someone, *cf.* JA 136) is "extortion" would improperly convert yet another class of state law civil actions into federal felony extortion and racketeering.

fear" were "property" under the Hobbs Act. OR Br. at 40 n.40.

NOW suggests that the instruction on the liberty interests of patients and employees would at worst be harmless error, as these liberty interests merge with those of the clinics. NOW Br. at 23 n.27. The notion that two of NOW's three "property" theories were mere surplusage not only strains credulity, it also ignores the dependence of the RICO claims NOW brings -- as an institutional representative and as representative of a class of women -- upon a showing of injury to the "business or property" of *women*, 18 U.S.C. § 1964(c); JA 145 (Q. 9), *not* of the *clinics*.

C. NOW Concedes that Impairment of Property is Not "Obtaining Property".

NOW concedes for the first time that *damaging* property is not the same as *obtaining* property as required for Hobbs Act extortion. NOW Br. at 24. *See also id.* at 30.[15] This concession is fatal to the judgment.

NOW's theory has always been that *interfering* with the use of "property" is the equivalent of *obtaining* that "property." *See* OR Br. at 4, 26. The courts below embraced precisely that understanding. *Id.* at 26, 29; OR Pet. App. 36a. Physically damaging or destroying property is the ultimate "interference" (albeit not "obtaining," *see* OR Br. at 29-39); by conceding that

[15]NOW notes that New York had adopted a statute outlawing as "extortion" the forcing of another to "destroy" certain valuable documents. NOW Br. at 26. The fact that New York had to adopt this separate provision only proves petitioners' point: the extortion provision that was the predecessor of the Hobbs Act, *Evans v. United States*, 504 U.S. 255, 261 n.9, 264-65 (1992), did *not* by itself include coercion or the coerced destruction of (much less mere interference with) property. Were NOW's sweeping view of extortion correct, New York's separate statutory prohibition on forcing the destruction of documents would have been entirely duplicative. More to the point, Congress did *not* adopt this *separate* provision when it borrowed the language of the Hobbs Act from New York law.

the *destruction* of property is not an obtaining, NOW concedes *a fortiori* that the mere temporary *interference* with use of property (as here) is likewise not "obtaining," and thus not Hobbs Act extortion.[16]

D. NOW's Substitute Theory of Violence-Used-to-Control-Assets Cannot Salvage the Judgment.

The Seventh Circuit's sweeping holding that Hobbs Act extortion requires no more than "a loss to, or interference with the rights of, the victim," OR Pet. App. 36a -- which simply embraced NOW's theory of the case, *e.g.*, Tr. 5008 (respondents' closing argument) ("Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion") -- is plainly indefensible. OR Br. § II(A); Sch. Br. § I. NOW therefore urges instead that this case is about an effort by "violence" to "obtain control over . . . valuable assets," NOW Br. at i, 12. NOW's recast theory cannot salvage the judgment here for several critical reasons:

First, NOW's invocation of "violence" is simply an unsupported smear tactic that cannot rehabilitate the judgment:

- Petitioners explicitly embraced nonviolence. OR Br. at 2. Indeed, OR insisted that all participants at OR events take a pledge of nonviolence. *Id.*
- The district court dismissed on summary judgment, as lacking an evidentiary basis, NOW's "strained" allegations about murder, arson, and kidnaping. OR Pet. App. 199a-201a.
- The jury did not find anything more than four isolated acts or threats of violence (including violence against

[16]NOW errs when it contends that petitioners agreed that making someone "part with" property equals "obtaining" property. NOW Br. at 25 n.29. OR has argued to the contrary throughout this case. OR's attempt to work out agreed jury instructions in the face of the district court's repeated rejection of OR position, *see* OR Br. at 26, was not a waiver, and no party has suggested that it was.

property), by unnamed persons, out of an entire fourteen-year, nationwide host of anti-abortion "rescue" protests involving thousands of people. OR Br. at 2-3, 4 n.8, 5 n.10, 32 n.34.

- The jury instructions did not even require a finding of violence as a prerequisite to extortion. JA 136 ("fear" of "economic injury" suffices to satisfy element of "force, violence or fear").
- The Seventh Circuit's affirmance of the extortion counts did not even discuss, much less depend upon, "violence" as a distinguishing factor. OR Pet. App. 35a-36a.

In short, NOW's "violence" rhetoric is unfair, unfounded, and irrelevant.

Second, NOW's reinvention of its extortion theory as a claim that petitioners sought "the clinics' consent to Petitioners' exercise of control over the use of *all* clinic assets," NOW Br. at 25 (emphasis in original; footnote omitted), is simply an effort to switch -- or disguise -- theories on appeal. Again, this ploy cannot save the judgment:

- NOW never claimed or proved that petitioners sought to "take over" or "run" the abortion industry or any segment thereof, and NOW cites no record basis for such an outlandish notion.
- The jury instructions did not require a finding that petitioners sought an "extraordinary degree of ongoing control," Cal. Br. at 1. Rather, the jury had only to find that petitioners "or others associated with PLAN" sought to make clinics, staff, or patients "give up" a "property right." JA 136. This "giving up" of a "property right" could be a mere temporary interference with access. OR Br. at 4, 26 (citing transcript).
- NOW itself equates mere *interference* with or *influence* on a business with what it now labels "control over . . .

valuable assets," *see* NOW Br. at 22 (misconduct "designed to change business decisions" form the "core" of extortion), 24 (make a business "abandon lawful uses"), 27 ("loss to the victim" is the gravamen of extortion). Hence, even under NOW's recast category of extortion, any protest that crosses into illegality -- such as a temporary or obstructive sit-in, no matter how peaceful -- would be "designed to change business decisions," NOW Br. at 22, and thus would qualify as felony extortion. *Accord* LLDF Br. at 4 ("The Hobbs Act becomes a prosecutorial Deluxe Swiss Army Knife, useful in just about any situation").

- The jury instructions did not limit extortion to the "control" of "valuable assets," NOW Br. at 12, but instead swept into the definition of "property rights" such intangible liberty interests as

> anything of value, including a women's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.

JA 136.

In short, NOW seeks affirmance of a theory that is *not* the one on which liability was imposed and affirmed. Even if NOW's theory were sound -- which it is not -- it could not save the judgment from reversal.

E. NOW's Expansive Definition of "Property" Cannot Salvage the Judgment.

NOW expends considerable effort arguing that the conduct of a business is a form of "property" obtainable for purposes of Hobbs Act extortion. NOW Br. at 13-23. *See also* U.S. Br. at 15-21. The Scheidler defendants marshal an impressive showing to the contrary. Sch. Br. at 18-35. This is an

important legal question, but whichever side has the better argument, the judgment at issue here must be overturned.

First, assuming *arguendo* that running a business is "property," no such property was *obtained* here, as required for extortion. OR Br. at 29-39. Emblematic of NOW's theory is the Second Circuit case of *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert denied*, 397 U.S. 1021 (1970), in which the defendants threatened violence in order to push a garbage removal company out of certain territory. But in *Tropiano*, the defendants were *competitors* who wanted the garbage collection business in that area *for themselves*. In other words, defendants sought by threat of violence to *obtain the market share from their competitors*. Whether the Second Circuit was correct in deeming this an "obtaining of property" is entirely irrelevant here, because in the present case no one claims that petitioners sought to muscle their way into a share of the abortion market.[17]

Second, even if "business" were a form of property that could be obtained," there is a world of difference between *taking over* a business and merely *interfering* with it. NOW obliterates this distinction, equating the protester who insists, "Stop selling animal furs," with the mobster who runs a captive furrier executive from the shadows. NOW Br. at 13. This, however, would render all technically unlawful protest methods (sit-ins, for example, or political graffiti) extortionate. *See* OR Br. at 26-29, 41. The United States concedes as much. U.S. Br. at 28-29 ("sit-ins and other protest activity that disrupt businesses" constitute "extortion, [but] not robbery"). This limitless theory of "obtaining property" must fail. OR Br. § II.[18]

---

[17]NOW's faulty theory would equate environmental protesters, seeking to stop unsafe dumping practices, with the *Tropiano* mobsters.

[18]As one amicus shrewdly observes:

(continued...)

Third, the jury in this case was not instructed that property includes the right "to provide medical services," but rather the right "to provide medical services free from wrongful threats, violence, coercion and fear," JA 136. This formulation reads the *means* element of extortion, 18 U.S.C. § 1951(b)(2) ("actual or threatened force, violence, or fear") into the "obtaining of property" element, *id.*, essentially negating the "obtaining of property" element. In other words, *any* use or threat of force, violence, or fear will *by definition* make someone "lose" the right to be free from the use or threat of force, violence, or fear. *Cf.* NACDL Br. at 11 ("the Hobbs act will have become a general crime of violence"). Thus, the jury was given a definition of property that was circular with the means element of extortion. The jury was *not* given an instruction that required the jury to find "property" as an independent element. Hence, the judgment cannot stand even under NOW's reworked theory of "property."

F. NOW's Other Extortion Arguments are Meritless.

NOW suggests that this Court has categorically rejected application of the rule of lenity to the Hobbs Act. NOW Br. at 32 n.41. The opposite is true. OR Br. at 49.

NOW offers no response to OR's argument that conduct typical of civil disobedience does not constitute "force, violence, or fear" under the Hobbs Act. OR Br. at 43-44. NOW also gives no response to petitioners' arguments based on the statutory construction rules of constitutional doubt and the requirement of a clear statement for federal intrusions into the

---

[18](...continued)

> When courts can stretch the language of a law to make it encompass conduct which no reasonable person, not even a very imaginative reasonable person, would ever have dreamt of, and in so doing can increase the penalties for such conduct exponentially, then the rule of law has been gutted.

LLDF Br. at 5.

federalism balance. OR Br. at 46-48. Amicus Center for Individual Rights, by contrast, highlights yet another constitutional concern militating against an expansive reading of the Hobbs Act, namely, countervailing limits on the Commerce Clause power of Congress. CIR Br. at 16-18. *See also* Oestreicher, *Scheidler Meets Morrison (at the Entrance to a Health Clinic)*, 35 Creighton L. Rev. 693 (2002).

In its opening brief, OR emphasized that NOW has never claimed to be able to prove extortion under a proper understanding of the Hobbs Act, OR Br. at 49, and that petitioners are therefore entitled, not just to a new trial, but to judgment in their favor on the Hobbs predicates, *id.* NOW has not contested this. Instead, NOW argues that its *state* extortion predicates suffice to support the judgment. NOW Br. at 33-36. NOW is mistaken. OR Pet. at 23-26.[19] Tellingly, NOW's arguments in support of the state predicates simply echo NOW's faulty Hobbs Act theory. NOW Br. at 34-35. Rejection of NOW's Hobbs Act theory *requires* rejection of NOW's state law extortion claims because, as NOW's amicus concedes, Former Federal Prosecutors Br. at 13-14, both Hobbs Act extortion (18 U.S.C. § 1951(b)(2)) and the federal generic extortion definition (taken from *United States v. Nardello*, 393 U.S. 286 (1969)) are indistinguishable. State crimes must satisfy the

---

[19]NOW does not even try to defend the improper "generic state extortion" instruction the district court gave in lieu of instruction on the particular elements of each pertinent state's extortion law. (The Seventh Circuit declined to reach this issue because it upheld the Hobbs Act claims. OR Pet. App. 36a-37a. Overturning the Seventh Circuit as to the Hobbs Act predicates puts the remaining state (and Travel Act) predicates squarely in issue.)

Instead of defending the generic state instruction, NOW recycles its claim that petitioners waived any objection to the generic state instruction. NOW Br. at 36 n.47. This "waiver" contention is demonstrably false. OR Reply to Opp. at 8-9; RA 18-23.

federal generic minimum elements to qualify as RICO predicates, OR Br. at 49-50; OR Pet. at 23-24; hence, failure to meet the Hobbs elements (aside from the interstate commerce element) means failure to meet the federal minima. OR Pet. at 24. (NOW's Travel Act Predicates, meanwhile, fall with the Hobbs and state extortion predicates. OR Br. at 50.)

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted this 18th of October, 2002,

Walter M. Weber
Larry L. Crain
David A. Cortman
Robert W. Ash
American Center for Law and Justice
1650 Diagonal Road, 5th Fl.
Alexandria, VA 22314
(703) 740-1450

Jay Alan Sekulow
Counsel of Record
Colby M. May
Stuart J. Roth
James M. Henderson, Sr.
Vincent P. McCarthy
American Center for Law and Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Thomas P. Monaghan
Charles E. Rice
Center for Law and Justice International
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

Attorneys for Petitioner Operation Rescue

APPENDIX:

116 Cong. Rec. 35,346-47
[excerpt]

[35,346]

MR. STEIGER of Arizona . . . .

. . . It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a [35,347] right to obtain proper redress. It is a rather simple approach and one I am sure we can all support under the bill as it now stands they may have this option. I am convinced under the language proposed by this amendment they will have the option. Really, insofar as I am concerned it is just that simple.

(36) (32)

Nos. 01-1118, 01-1119

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONERS JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE HOBBS ACT DOES NOT PUNISH EVERY INTERFERENCE WITH CONTRACTUAL RIGHTS OR THE RIGHT TO CONTROL PROPERTY 1

A. Respondents' Definition Of Extortion Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act 2

B. Respondents' Definition Departs From The Traditional Meaning Of Extortion Under New York Law 8

C. Respondents Are Wrong To Suggest That The Judgment Can Be Salvaged 13

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 19

Barnes v. *Gorman*, 122 S. Ct. 2097 (2002) 19

Bell v. *Hood*, 327 U.S. 678 (1946) 19

Califano v. *Yamasaki*, 442 U.S. 682 (1979) 20

Carpenter v. *United States*, 484 U.S. 19 (1987) 12

Cleveland v. *United States*, 531 U.S. 12 (2000) 12

College Savings Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 10

D.R. Wilder Mfg. Co. v. *Corn Prods. Refining Co.*, 236 U.S. 165 (1915) 16, 17

Evans v. *United States*, 504 U.S. 255 (1992) 3, 8

Ford v. *Wainwright*, 477 U.S. 399 (1986) 3

Franklin v. *Gwinnett County*, 503 U.S. 60 (1992) 19

Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 19

Great-West Life & Annuity Ins. Co. v. *Knudsen*, 122 S. Ct. 708 (2002) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Griffin v. *United States*, 502 U.S. 46 (1991) 14

Grupo Mexicano v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) 16, 20

Holmes v. *SIPC*, 503 U.S. 258 (1992) 16, 17, 19

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 18

Lane v. *Peña*, 518 U.S. 187 (1996) 20

Maryland v. *Baldwin*, 112 U.S. 490 (1884) 14

McCormick v. *United States*, 500 U.S. 257 (1991) 10

Minnesota v. *Northern Sec. Co.*, 194 U.S. 48 (1904) 16

Northeast Women's Center, Inc. v. *McMonagle*, 868 F.2d 1342 (3d Cir. 1989) 5

Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) 15, 16, 17

People v. *Barondess*, 31 N.E. 240 (N.Y. 1892) 11

People v. *Cadman*, 57 Cal. 562 (1881) 9

People v. *Spatarella*, 34 N.Y.2d 157 (1974) 11

People v. *Squillante*, 185 N.Y.S.2d 357 (Sup. Ct. 1959) 11

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Tonielli*, 22 P. 678 (Cal. 1889) 9

People v. *Vidaver*, 112 N.Y.S. 606 (Gen. Sess. 1908) 7

People v. *Wisch*, 296 N.Y.S.2d 882 (Sup. Ct. 1969) 11

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 18, 19

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 16, 19

Smith v. *United States*, 508 U.S. 223 (1993) 10

Stirone v. *United States*, 361 U.S. 212 (1960) 4, 9

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) 14

Tafflin v. *Levitt*, 493 U.S. 455 (1990) 16

United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 16

United States v. *Craft*, 122 S. Ct. 1414 (2002) 3

United States v. *Enmons*, 410 U.S. 396 (1973) 7, 10

United States v. *Hudson and Goodwin*, 11 U.S. 32 (1812) 3

United States v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970) 9, 10

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Turkette*, 452 U.S. 576 (1981) 19

Yates v. *United States*, 354 U.S. 298 (1957) 14

Statutes:

15 U.S.C. § 4 ..... 14, 15

15 U.S.C. § 25 15

18 U.S.C. § 248 20

18 U.S.C. § 248(a)(1) 20

18 U.S.C. § 248(c)(1)(B) 20

18 U.S.C. § 1341 12

18 U.S.C. § 1951(a) ..... *passim*

18 U.S.C. § 1964 ..... *passim*

18 U.S.C. § 2113(a) 13

Federal Anti-Racketeering Act of 1934, 48 § 979, ch. 569 (1934) 1, 13

CAL. PENAL CODE § 518 9

CAL. PENAL CODE § 519 9

CAL. PENAL CODE § 523 9

N.Y. PENAL LAW § 851 (1909) 10, 11

Miscellaneous:

91 CONG. REC. 11,906 (1945) 13

W. BLACKSTONE, COMMENTARIES (17th ed. 1830) 5

Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) 4

RESTATEMENT OF PROPERTY (1936) 4

Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF L. REV. 325 (1980) 4, 5

Respondents open their brief with a long jury speech consisting of a highly selective account of disputed evidence presented at this contentious trial. The assumption underlying this recitation is that every single bad act over the course of 15 years of anti-abortion protests that was referred to at trial was perpetrated by a "PLAN member." Even if that were true (and it is not), and even if these incidents happened the way respondents portray them (and they did not), the critical point is that there is no basis whatsoever for concluding that the *jury credited or relied* on respondents' litany.

The jury in this case found that *only four* "[a]cts or *threats* of physical violence" to a "person *or property*" had occurred. J.A. 144 (emphasis added). There is no way of knowing, because respondents vigorously opposed greater specificity in the jury's findings, whether those four unidentified incidents by unidentified protesters involved acts of violence against people or only threats of violence against "property" (broadly defined as "*anything* of value" (J.A. 136) (emphasis added)). The remaining "crimes" that respondents repeatedly cite – which, according to the jury's findings, did *not* involve acts or even threats of physical violence – consisted of "extortion" as that offense was sweepingly defined in the jury instructions. In any event, this case is *not* about the conflicting evidence presented at trial; it is about the proper legal definition of extortion under the Hobbs Act and the availability of injunctive remedies in private civil actions under RICO. On those *legal* issues, respondents have nothing persuasive to say.

I. THE HOBBS ACT DOES NOT PUNISH EVERY INTERFERENCE WITH CONTRACTUAL RIGHTS OR THE RIGHT TO CONTROL PROPERTY

In our opening brief (at 10-18), we explained that the Seventh Circuit's broad definition of extortion is inconsistent with the text, structure, and legislative history of the Hobbs Act and its predecessor, the Federal Anti-Racketeering Act of 1934. In effect, the lower courts transformed extortion into the far broader, but less serious, crime of *coercion* – even though there

is clear evidence that Congress, in passing the Hobbs Act, elected *not* to punish coercion. See 0-1118 Pet. Br. 23-24, 29-32. And the Seventh Circuit's analysis represents a vast departure from the settled meaning of a term of art – the "*obtaining* of *property from another*" – contained in the Field Code of 1865 and carried forward in the New York extortion statutes on which the Hobbs Act was modeled. See *id.* at 18-28.

Strikingly, respondents make no effort to defend the *actual holding* of the Seventh Circuit or the language of the jury instructions. Instead, respondents have come up with new definitions: the "property" of the clinics – defined as the "right * * * to provide medical services" in the jury instructions (J.A. 136) and the "right to conduct a business" in the Seventh Circuit's opinion (01-1118 Pet. App. 29a) – has now been transformed into a right to "direct the use and disposition" of "the tangible physical assets of a clinic." Resp. Br. 10. The "property" of the putative patients – defined as "a woman's right to seek services from a clinic" in both the instructions and the opinion – now makes its debut as a right "to the benefits of * * * fee-for-service contracts with medical providers." *Id.* at 12. And the concept of "obtaining" – defined as causing someone to "give up" a "property right" in the instructions and even more broadly in the Seventh Circuit's opinion as any "loss to, *or interference with* the rights of, the victim" – has now been repackaged as wresting "control over the use and disposition of an asset." Resp. Br. 24. As we explain below, respondents' newly minted formulations – which cannot salvage a judgment predicated on different legal definitions – are erroneous.

A. Respondents' Definition Of Extortion Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act

Respondents argue (at 12) that petitioners committed extortion by "overrid[ing] the clinics' lawful decisions about use of their business assets, including buildings, equipment, and personnel, and the patients' rights to the benefits of their fee-for-service contracts with medical providers." This argument proceeds in three steps. First, respondents equate "property" with

"property rights" by resorting to the modern analogy of property as a "bundle of sticks." See Resp. Br. 14-18; see also U.S. Br. 16-17 (arguing that "the right to control and use property *is itself* property") (emphasis added). Relatedly, respondents also say that all "rights created by contract" are "property." Resp. Br. 16. Second, respondents contend (invoking Blackstone) that the right to exclusive "control" over the "use, enjoyment, or disposal" of property is "[a]t the center of the bundle." *Id.* at 16, 17, 19; see also U.S. Br. 16, 18-19. And third, they argue that preventing someone else from exercising this right to control (or a contractual right) is tantamount to "obtaining" that right. Resp. Br. 24-29. This argument is flawed at every turn.

1. a. To begin with, "property" within the meaning of the Hobbs Act is simply not the same as any "right" or "interest" in property. As explained in our opening brief (at 13-14), Congress knows how to reach deprivations of, or interference with, "property rights" but has not done so in the Hobbs Act. Indeed, certain of the cases cited by respondents expressly distinguish between "property" and a "right in property," the very distinction respondents deny.[1]

Equally important, respondents' use of the "bundle of sticks" paradigm is fundamentally anachronistic. It was not until 1913 and 1917 that Wesley Hohfeld published his seminal

---

[1] *E.g.*, *United States* v. *Craft*, 122 S. Ct. 1414, 1422 (2002). Most of the "property" cases cited by respondent (at 14-17) and the government (at 15-16) address the meaning of that term in federal tax law or under the Takings or Due Process Clauses of the Constitution. Of course, where the government's taxation power is concerned, property is given its broadest possible meaning. See *Craft*, 122 S. Ct. at 1422-23. And, when interpreting the scope of constitutional rights, the Court's jurisprudence has been known to "evolve[]." *Ford* v. *Wainwright*, 477 U.S. 399, 405 (1986). But where a federal *crime* is involved, the federal courts are not free to implement their own "evolving" concepts of "property." See *United States* v. *Hudson and Goodwin*, 11 U.S. 32, 33 (1812) (no federal common law of crimes). And where Congress has incorporated common law concepts or terms of art in a criminal statute – such as "extortion" and "obtaining of property from another" – courts must give those terms their traditional meaning. See *Evans* v. *United States*, 504 U.S. 255, 264 (1992).

articles reconceptualizing property as a "complex aggregate of rights, privileges, powers, and immunities against other persons" (Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 361 (1980)) – a conception later adopted in the RESTATEMENT OF PROPERTY (1936). The models used by Congress for the Hobbs Act – the Field Code of 1865 and the New York Penal Codes of 1881 and 1909 – all predate these developments. These models therefore cannot be analyzed using the "bundle of sticks" metaphor, which is predicated on Hohfeld's theory. See Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712-14 (1996).

Respondents insist (at 13), however, that "property" must be treated as a "deliberately inclusive" term, citing *Stirone* v. *United States*, 361 U.S. 212 (1960). But this Court's recognition in *Stirone* of the Hobbs Act's "broad language" (*id.* at 215) was a specific reference to the Act's coverage of robberies and extortions that "in any way or degree" (18 U.S.C. § 1951(a)) interfere with interstate commerce. See 361 U.S. at 215. Contrary to respondents' suggestion (at 13), *Stirone* does not hold that every word in the Hobbs Act is to be broadly construed (an approach that would violate the rule of lenity). In fact, as we demonstrate in our opening brief (at 31-32), the legislative history shows that Congress intended to limit "extortion" to its traditional definition under New York law – a limitation regarded as necessary to protect the rights of labor.

Respondents also maintain (at 15 n.16) that "property" includes the patients' contractual right to "exchange money for medical services." There was of course no showing below (or any requirement of a showing) that the members of the patient class had any such "contracts." As we explained in our opening brief (at 25-26), the notion that contract rights are "property" under the Hobbs Act is contrary to New York law. See also *id.* at 16-17.[2] Equally important, if accepted it would convert the

[2] Respondents' authority for the proposition that "property" under the Hobbs Act includes contract rights (see Resp. Br. 16 n.17) includes only one Hobbs Act decision, *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 & n.8 (3d Cir. 1989), another abortion protest case that discussed this issue only in passing and cited no authority. Respondents also cite (at 16 n.17) a Second Circuit case involving mail fraud, but they neglect to cite this Court's contrary decision in *Carpenter*. See 01-1118 Pet. Br. 16-17.

state-law torts of interference with contractual relations and prospective advantage into federal crimes under the Hobbs Act.[3]

b. Next, respondents selectively invoke Blackstone for the proposition that the right to "control" over the "use, enjoyment, or disposal" of property is "[a]t the center of the bundle." Resp. Br. 16. Because Blackstone's concept of property was limited to *physical things*, however, respondents would necessarily lose this case if the Hobbs Act embodies Blackstone's general definition of property.[4] And, of course, respondents ignore Blackstone's more specific discussion of the narrower concept of "property" in criminal law, including under the crime of extortion. See 4 W. BLACKSTONE, COMMENTARIES 141 (17th ed. 1830) (extortion requires obtaining of "any money or *thing* of value") (emphasis added).

c. Even if one accepts the premise that the right to exclusive control of property and contract rights are "property," there is no basis for concluding that petitioners *obtained* from the respondent clinics (or the patients) the right to "control the use" of clinic assets (or the contractual right to purchase services). At most, respondents *interfered with* the clinics' right

[3] The Solicitor General pointedly refrains from addressing the "property" theories charged to the jury relating to the interests of the physicians and patients (as opposed to the clinics). See U.S. Br. 15 n.6. The lower court's opinion, however, specifically identifies all three theories of extortion and rejects petitioners' challenge to all three, explaining that the Seventh Circuit had previously held that "intangible property *such as* the right to conduct a business" is "property." 01-1118 Pet. App. 29a (emphasis added).

[4] Blackstone defined property as the "*sole and despotic dominion* which one man claims and exercises over *the external things of the world*, in total exclusion of the right of any other individual in the universe." 2 W. BLACKSTONE, COMMENTARIES 2 (17th ed. 1830) (emphasis added); see also Vandevelde, 29 BUFF. L. REV. at 330-33 (discussing "physicalist" and "absolutist" features of Blackstone's general theory of property).

of control or *temporarily thwarted its exercise* (during the pendency of the sit-ins). Nor did petitioners obtain the patients' alleged contractual rights. Of course, petitioners do not have these rights today (which is rather difficult to square with respondents' suggestion that petitioners have "obtained" them). To suggest that an interference of this kind is tantamount to "obtaining" obliterates the distinction between those concepts.

2. Respondents downplay several important aspects of the Hobbs Act that highlight the broad reach and ramifications of their proposed definition of extortion.

First, respondents (and their *amici*) largely ignore the fact that extortion under the Hobbs Act extends to the wrongful "obtaining of property from another" by inducing the victim to consent not only though "force" or "violence" but also through "fear" – a broad term that, under the jury charge, included "fear of wrongful *economic* injury." J.A. 136 (emphasis added).[5] For all we know, the jury's determination that petitioners committed extortion relied on a finding that their sit-ins and political protests had engendered a fear of "wrongful economic injury."

As Operation Rescue explained in its opening brief (at 43-44), it is doubtful that Congress intended to criminalize sit-ins and other political protests as extortion when it used the phrase "force, violence, or fear." It is certainly possible to read that phrase as including only physical force, violence, and fear of either physical force or violence. But as noted in our opening brief (at 22 n.16), New York extortion law defines "fear" in sweeping fashion to include fear of adverse economic consequences in a very broad sense.[6] The Court's analysis of the

---

[5] Respondents go so far as to rewrite the question presented to omit the word "fear." See Resp. Br. i (referring to use of "violence and threats of violence").

[6] Congress, of course, did not incorporate into the Hobbs Act the broad definition of "fear" contained in the New York statute (see 01-1118 Pet. Br. 3a). But that broad concept has been accepted by many federal courts, see Rutherford *Amicus* Br. 13-17, and was reflected in the jury instructions in this case. If "force, violence or fear" is limited to physical force, violence, and fear of either physical force or violence, then the Hobbs Act instructions in this case were erroneous and the judgment must be reversed.

remainder of the definition of extortion must take this feature into account.[7] Thus, if the Solicitor General is correct that causing a "business to cede control over what goods or services [it] will offer" (U.S. Br. 24) qualifies as the "obtaining of property from another," then doing so by engendering a reasonable fear of economic harm is now punishable by 20 years in prison.

Second, respondents do their best to ignore the serious federalism implications of their position for the closely related crime of *official* extortion. Both crimes prohibit the "obtaining of property from another," and neither respondents nor the government suggests that this language carries a different meaning under the two offenses. See U.S. Br. 20 (admitting that prosecutions for official extortion "typically involved the receipt of money").[8] But if respondents' interpretation of the Hobbs Act is correct, then official extortion would be expanded to cover any interference with the "control over the use and disposition of an asset" (Resp. Br. 24) done under color of official right. This would bring within the ambit of the Hobbs Act a vast array of official conduct that has traditionally fallen outside the purview of official extortion. See Alabama *Amicus* Br. 10-12.

---

[7] The government insists (at 24) that extortion can be committed even if the defendant does not have "a profit-making objective." At common law, however, the intent to wrongfully *acquire* the victim's property, known as *animus furandi*, was an indispensable element of all theft crimes, including extortion. See *People* v. *Vidaver*, 112 N.Y.S. 606, 606 (Gen. Sess. 1908) (indictment charging attempted extortion must include allegation of threat "made with intent to wrongfully obtain property from the [victim]"); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) ("[E]xtortion requires an intent to obtain that which * * * the party is not entitled to receive.") (internal quotation omitted); see also U.S. Br. 29 n.16 (conceding that "intent to steal" is an essential element of robbery).

[8] The government notes (at 21) that in passing the Hobbs Act, Congress expanded the common law definition of extortion to include acts by private individuals. It does not follow, however, that Congress intended to expand the definition of "property" in both official and private extortion. U.S. Br. 21. As explained in our opening brief (at 18-19, 28-32), the legislative history of the Hobbs Act shows otherwise.

3. As we showed in our opening brief (at 28-32), Congress, in passing the Hobbs Act and the 1934 Act, intended to *exclude* conduct that would constitute the separate, and much less serious, crime of coercion. Congress had before it the New York definitions of both extortion and coercion when it considered both pieces of legislation, and was acutely aware of the difference between the two offenses. 01-1118 Pet. Br. 29-31 & n.23. Respondents' broad reading of extortion subsumes conduct that New York law punished only as coercion in 1946, in direct contravention of Congress's intent.

Respondents have nothing persuasive to say in response. They first suggest, inconsistently, that (1) "extortion is simply a subset of coercion that involves property" and (2) "coercion is a lesser included offense" of extortion. Br. 26 n.32. In fact, the crimes are distinct (see 01-1118 Pet. Br. 2a-3a); it is only respondents' sweeping definition of "the obtaining of property from another" that threatens to collapse the two crimes into one. Next, respondents (at 26 n.32) point to this Court's shorthand reference to "coercive extortion" in *Evans*. But we do not dispute that non-public extortion involves the use of wrongful *compulsion* (or coercive means) by the perpetrator. It does not follow, however, that the *crime* of coercion and the *crime* of extortion are the same (or even substantially overlapping).

B. Respondents' Definition Departs From The Traditional Meaning Of Extortion Under New York Law

Respondents acknowledge that Congress modeled the Hobbs Act after the New York Penal Codes of 1881 and 1909. Resp. Br. 18; accord U.S. Br. 17. This is fatal to their argument.

1. As explained in our opening brief (at 19-23), the Field Code of 1865 – and the New York Penal Codes of 1881 and 1909 that adopted and carried forward the Field Code's definition of "extortion" – meant something quite specific and limited when they referred to the "*obtaining* of *property from another*." Every extortion case we have found in New York or other jurisdictions prior to the Field Code's publication (and every case cited in the cross-referenced notes to the larceny provision) involved a defendant who *actually acquired* from the victim

"property" in a very narrow sense. The same is true of *every reported extortion case* decided between 1865 and 1946, when the Hobbs Act was passed, not only in New York (see 01-1118 Pet. Br. 24) but also in the 10 other States that modeled their extortion statutes after the Field Code. See 01-1118 Pet. Br. 27 n.21.[9] In addition, every reported *federal* case brought under the 1934 Act – which also punished the "obtain[ing of] the property of another" – involved an extortionist who sought *money* from a victim. *Id.* at 31 n.24.

Not until *1969* – more than a century after the Field Code and almost a quarter century after the Hobbs Act – did the New York and lower federal courts embark on a judicial expansion of the term of art "the obtaining of property from another." See 01-1118 Pet. Br. 26 n.20 (citing New York cases). The first federal decision to do so of which we are aware, *United States* v. *Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970), which is the fountainhead of all the later federal decisions, held that the "right to pursue a lawful business" and "to solicit customers" is "property" that can be obtained under the Hobbs Act. In reaching that result despite a "serious[] challenge[]" raised by the defendant (418 F.2d at 1069), the Second Circuit relied on three grounds: (1) the same misreading of *Stirone* advanced by respondents in this Court (see page 4, *supra*); (2) an uncritical reliance on prior Hobbs Act cases that had interpreted the distinct concept of "fear" (see page 10, *infra*); and (3) federal due process decisions recognizing a broad concept of "property." *Id.* at 1075-76.

Notably, the third basis for the decision in *Tropiano* has

---

[9] Contrary to respondents' contention (at 21), *People* v. *Cadman*, 57 Cal. 562 (1881), did not "hold" that "the intangible right to pursue an appeal is property." As we noted in our opening brief (at 27 n.21), the California Supreme Court there simply "assum[ed]" for the purposes of the appeal that such a right might qualify as "property." 57 Cal. at 564. In addition, *Cadman* did not construe California's extortion statute modeled after the Field Code, CAL. PENAL CODE § 518, but rather Sections 519 and 523, which separately punished the sending of threatening letters. 57 Cal. at 563; see also *People* v. *Tonielli*, 22 P. 678, 679 (Cal. 1889).

been invalidated by this Court's decision *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). There, the Court observed that while "[t]he assets of a business (including its goodwill) unquestionably are property[,] * * * business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense." *Id.* at 675 (emphasis in original); see also *id.* at 674 (although the right to acquire property by honest labor and right to conduct a lawful business are to be *treated* as property in courts of equity, they are not *property*). Thus, it is far from clear that *Tropiano* remains good law.[10]

In any event, neither respondents nor the government explains why, if "the obtaining of property from another" means what they say it means, it took more than a century for federal and state prosecutors to discover that. "It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *United States* v. *Enmons*, 410 U.S. 396, 410 (1973); see also *McCormick* v. *United States*, 500 U.S. 257, 277 (1991) (Scalia, J., concurring).

Respondents and the government contend, however, that New York law *did* recognize a broader concept of "property" that was relevant to the crime of extortion. Resp. Br. 19-20 & n.23; U.S. Br. 17-18. But all of the cases they cite either were decided decades *after* the Hobbs Act was passed, or are distinguishable because they discuss the types of threatened "injur[ies]" to "person or property" that will give rise to "fear" within the meaning of N.Y. PENAL LAW § 851 (1909). The latter cases construe the word "property" in a very different context, however, as a close examination of Section 851 makes clear. See 01-1118 Pet. Br. 3a (setting out entire text of Section 851); see also *Smith* v. *United States*, 508 U.S. 223, 229 (1993)

[10] No doubt because he recognizes this problem, the Solicitor General now attempts to recast *Tropiano* as involving "the exclusive right to control the conduct of [a] business's operations" rather than what the Second Circuit said it involved: the right "to pursue a lawful business" and "to solicit customers" (418 F.2d at 1076). See U.S. Br. 23; compare *id.* at 19.

(explaining that "[t]he meaning of a word" in a statute must be "analyzed in light of the terms that surround it").

Given the broad sweep of Section 851, which defines "fear" expansively to include any threat of exposure of a secret or some type of "disgrace," it would have been difficult to conclude that the New York legislature intended to limit the "person or property" that can be threatened with injury to those forms of property traditionally protected against wrongful acquisition. See *People* v. *Barondess*, 31 N.E. 240, 242 (N.Y. 1892) (explaining that "the section [*i.e.*, Section 851] has not employed the term in that manner"). Why would the legislature have intended to punish compelling a business owner to make a pay-off induced by a threat to reveal a secret but not a threat to shut down the business through a work stoppage? In either case, a pay-off was extorted by a wrongful inducement. Thus, the government is quite wrong in suggesting (at 18) that there was "no basis" for interpreting the word "property" in Section 850 differently from "person or property." Indeed, one New York court found such a basis. See *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959).[11]

Moreover, the government's contention that "property" must have the same meaning everywhere it appears in a statute undermines its own reading of the Hobbs Act. Section 1951(a) punishes not only acts of "extortion" and "robbery" (and attempts and conspiracies to commit those offenses) but also acts or threats of "*physical violence* to any person or *property* in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a) (emphasis added). As used

[11] Respondents (at 20 n.23) unfairly disparage *Squillante*, an opinion written by Justice Bernard S. Meyer (who went on to serve on the New York Court of Appeals in 1979-1986), as involving "tortured reasoning." Respondents (at 19-23 & n.23) and the government (at 18-19) rely heavily on *People* v. *Spatarella*, 34 N.Y.2d 157 (1974). But in that case, and in *People* v. *Wisch*, 296 N.Y.S.2d 882, 886 (Sup. Ct. 1969), New York courts – construing a later penal code enacted in 1965 – relied on the older cases involving the meaning of "fear" as defined in N.Y. PENAL LAW § 851 (1909), and did so without offering any analysis of Section 851 and without even citing *Squillante*.

in this residual clause of the Hobbs Act, "property" plainly connotes something tangible, since intangible property cannot be the subject of "physical violence." Thus, if this Court were to apply the government's canon of construction, the government's interpretation of the Hobbs Act (and respondents') would have to be rejected.[12]

2. Next, respondents say (at 13) that we fail to offer a "coherent theory of what property" includes. They are mistaken. To begin with, the historical definition we derive from the New York case law – "money, tangible things of value, or notes, bills, or other written documents entitling the holder to money or other tangible property" (Br. 19) – is hardly indeterminate. The fact that this definition does not feature a bright conceptual line (as between real and personal property) is a function of the common-law development of property-law crimes, which proceeded incrementally by expanding the protections of the criminal law to new forms of property. This Court has not hesitated to require the lower courts to engage in a historical inquiry of this kind where one is warranted. See *Great-West Life & Annuity Ins. Co.* v. *Knudsen*, 122 S. Ct. 708, 716-17 (2002). In the alternative, we also offer several definitions that draw upon limits recognized in New York law and expressed in the language of the Hobbs Act, such as the requirement that "property" at least be something that is transferable (and capable of being "obtained"). See 01-1118 Pet. Br. 14, 24-26. Respondents' attempt (at 17-18 & n.20) to counter that argument by citing non-New York cases and academic commentary that are far afield is wholly unpersuasive.

3. Respondents say (at 12) that our historical reading of the

[12] As we noted in our opening brief (at 16-17, 34 n.27), the mail fraud statute reaches a larger category of "property" than does the Hobbs Act. The mail fraud statute refers to "any scheme or artifice to defraud, *or for obtaining money or property*" (18 U.S.C. § 1341 (emphasis added)). The latter phrase – which was added in an amendment – was intended to mirror the reach of the "scheme or artifice to defraud" language, which is far broader than the language of the Hobbs Act. See *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000); *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987).

Hobbs Act is "too circumscribed to achieve its obvious purposes," but as we have demonstrated (at 28, 30-31), Congress's purpose in enacting the Anti-Racketeering Act of 1934 and the Hobbs Act was in fact relatively narrow: to bring a halt to the "rackets" that were being used by gangsters and organized crime to extract payments and other "tribute" from businesses.[13]

4. Respondents warn (at 12-13) that if our reading of the Hobbs Act is accepted, "terrorists" who committed other state or federal crimes (such as conspiracy to kidnap, assault, criminal coercion) would no longer be punishable under Section 1951. The text and legislative history of the Hobbs Act make clear, however, that Congress never intended the statute to be the panacea respondents suggest. And, of course, there is nothing to prevent Congress from amending the Hobbs Act (or creating new crimes) if it wishes to add yet another layer of criminal proscriptions to those that already exist under other federal and state criminal laws.[14]

C. Respondents Are Wrong To Suggest That The Judgment Can Be Salvaged

As we have noted (01-1118 Pet. Br. 17 n.12), it is impossible to determine which predicate acts formed the basis for the

[13] Despite their condemnation elsewhere of "foray[s] into legislative history" (Resp. Br. 43), respondents seize upon a reference made by a Member of Congress to the "night-riders" of Kentucky (*id.* at 18). The point of this statement, however, was that "crimes" such as "murder, rape, kidnaping, arson, theft, * * * robbery *and* extortion" are "not confined to racketeers in the labor movement." 91 CONG. REC. 11,906 (1945) (emphasis added). Nothing in this passing remark detracts from our showing (Br. 32 n.25) that the examples of *extortion* used throughout the legislative debates reflect the historical definition set forth in our opening brief.

[14] Similarly, *Amici* Former Federal Prosecutors *et al.* insist (at 21) that our reading of the Hobbs Act would have "grave implications for federal law enforcement" because it would "decriminalize" conduct that Congress has proscribed in eight other sections of Title 18. But only *one* of the cited statutes contains language similar to that of the Hobbs Act. See 18 U.S.C. § 2113(a). Nor have *amici* shown that Congress, in passing these other provisions, similarly drew upon New York extortion law circa 1946, which in turn borrowed its core concepts from the 1865 Field Code.

jury's RICO verdict, or for its determination of damages. It is possible, therefore, that the verdict was based on Hobbs Act violations that, as a matter of law, were not violations at all. Under this Court's well-settled precedent, the judgment must therefore be vacated. See *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962). Notably, this principle necessitates a reversal of the entire verdict if *any* of the three theories of extortion charged to the jury was legally defective.

Respondents maintain otherwise, contending that "the jury's verdict would stand" (Br. 34) even if this Court determines that petitioners did not violate the Hobbs Act because the jury found that petitioners committed other predicate acts. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court "affirmed a general verdict even though it may have rested on a prong of the instruction *as to which the evidence was insufficient*." Resp. Br. 35 n.46 (emphasis added). But *Griffin* also reaffirmed the rule of *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a general verdict that might have rested on *legal error* – and not insufficiency of the evidence – must be vacated. See *Griffin*, 502 U.S. at 56, 58-59. None of the lower court cases cited by respondents (at 34) is to the contrary. At a minimum, then, the judgment must be vacated.

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

1. *The Antitrust Models for Section 1964(c).* Respondents do not deny what this Court has repeatedly recognized: Section 1964(c) was modeled on Section 4 of the Clayton Act, which in turn was modeled on Section 7 of the Sherman Act. 01-1118 Pet. Br. 37-38. Nor do they dispute that the relevant language of these three provisions is in every material respect identical. These antitrust models were clearly understood, when RICO was enacted, as *not* authorizing private injunctive relief.

Respondents nevertheless contend that the same language carries a different meaning in Section 1964(c) because of differences between the language of Section 1964(a) of RICO and the corresponding jurisdictional provisions of the Sherman Act (15

U.S.C. § 4) and the Clayton Act (15 U.S.C. § 25). See Resp. Br. 41-43. Specifically, respondents note that, whereas each of the antitrust provisions contains two components separated by a semicolon (the first vesting equitable jurisdiction in the district courts; the second authorizing the United States to "institute proceedings * * * to prevent and restrain * * * violations"), Congress elected in RICO to put those components into separate subsections (§§ 1964(a) and (b)). Although they describe this as a "key structural difference[]" (Resp. Br. 41), respondents identify no reason why the choice of a semicolon over a separate subsection heading should qualify as such, and it is difficult to imagine why it should. Accord U.S. Br. 11.

Respondents also make much of the fact that the Sherman and Clayton Act provisions state that "it shall be the *duty*" of the Attorney General to "institute proceedings in equity to prevent and restrain" violations (15 U.S.C. § 25(a) (emphasis added)), whereas Section 1964(b) states that the Attorney General "*may* institute proceedings under this section." 18 U.S.C. § 1964(b) (emphasis added). See Resp. Br. 42-43. But there is no real difference between those formulations; in both cases, the Attorney General is given the discretion ("duty") to institute injunctive proceedings if he chooses. Moreover, any conceivable difference in the Attorney General's enforcement discretion would shed no light on the very different question whether *private parties* are authorized to seek injunctive relief.

Nor have respondents accurately disputed our submission that, at the time RICO was enacted, this Court's decisions had clearly established that private injunctive relief was *not* authorized under the precursor Sherman Act provisions. Indeed, *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), which respondents misread, see 01-1119 Merits Reply Br. 6-7, was decided over a dissent arguing – as respondents argue here – that "in the absence of some provision to the contrary, the right to relief by injunction * * * rests upon settled principles of equity." 244 U.S. at 473. Notably, respondents make no effort to explain the many other decisions of this Court identified by the Solicitor General (at 10 & n.4) that applied the holding of *Paine Lumber*.

Respondents fare no better in seeking to distinguish *Paine Lumber* on the ground that it predated "the merger of law and equity" in 1938. Resp. Br. 42; see also Motorola *Amicus* Br. 17-18. This Court has repeatedly reaffirmed the holding of that case – including post-merger. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941). In any event, the merger of law and equity "did not alter substantive rights." *Grupo Mexicano* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). It merely removed one (purely procedural) reason why Congress might have chosen to discuss equitable and legal remedies separately; it did not remove other, non-procedural reasons, such as the policy rationales animating Congress's decision to assign to the federal government the exclusive authority to seek injunctive relief under the Sherman Act (and RICO). See *Minnesota* v. *Northern Securities*, 194 U.S. 48, 70-71 (1904); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 175-76 (1915); U.S. Br. 14-15.

Respondents point out that this Court occasionally has "rejected the antitrust analogy when analyzing RICO." Br. 43 (citing *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), and *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985)). Those cases, however, are exceptions to the rule. See 01-1118 Pet. Br. 39. In *Sedima*, which relied on the antitrust analogy in resolving one issue but not another (473 U.S. at 489-90), there was strong evidence in RICO's legislative history that Congress "sought to avoid" problems that would arise if the specialized "body of precedent" dealing with antitrust standing were imported into RICO in the form of an analogous "racketeering injury" requirement. 473 U.S. at 498-99. In *Tafflin*, this Court ruled that its traditional, exacting standard for overcoming the presumption in favor of concurrent jurisdiction could not be satisfied by "the Clayton analogy" alone. 493 U.S. at 459-63.

Here, in contrast, reliance on the antitrust analogy is particularly fitting: the availability of private injunctive relief under RICO hinges on the meaning of text in Section 1964(c) that is in every material respect identical to the Clayton and Sherman Act provisions from which it was drawn. See *Holmes* v. *SIPC*,

503 U.S. 258, 268 (1992).[15]

2. *Other Arguments Based on RICO's Text and Structure.* Respondents seek to overcome the inference based on the antitrust models by contending (at 37) that Section 1964(a) "unambiguously" confers on district courts broad equitable jurisdiction. But that hardly answers the critical question of *who* may properly invoke the district court's equitable powers. That question is answered by 18 U.S.C. § 1964(b) (emphasis added): "*The Attorney General* may institute *proceedings under this section*." Contrary to respondents' suggestion, Section 1964(b)'s unqualified authorization of actions by the government – which respondents quote only selectively (Resp. Br. 38) – is simply *not* equivalent to Section 1964(c)'s far more limited authorization of private litigants who can demonstrate an "injur[y]" to their "business or property" to "sue therefor" and recover the specified remedies of treble damages and costs.

Next, respondents emphasize that Section 1964 nowhere expressly "precludes injunctive relief to private parties." Br. 37; see also *id.* at 39. But this Court has never imposed such an onerous and absurd drafting obligation on Congress, nor should it here. In fact, this Court *rejected* this very argument in interpreting the language of the Sherman Act on which civil RICO was modeled. See U.S. Br. 10-11 & n.5. *In D.R. Wilder Mfg. Co.*, the Court acknowledged that "there are no words of express exclusion" in the Sherman Act barring individuals from "act[ing] in the enforcement of the statute," but concluded that "such exclusion must be implied * * * because of the familiar doctrine that where a statute * * * gives a new right and declares the remedy, the * * * remedy can be only that which the statute prescribes." 236 U.S. at 174-75 (internal quotations omitted). The Court reaffirmed that principle in *Paine Lumber*. See 244 U.S. at 470-71.

---

[15] We did not "concede that private injunctions were available" in our "1993 brief to this Court." Resp. Br. 44 n.55. All we said is that the "civil remedies" provided under Section 1964 "include injunctions." That is beyond dispute: Section 1964 authorizes *the government* to seek injunctive relief.

Finally, respondents assert that Congress "combined the language" from "§ 4, * * * § 15, * * * *and § 16*" of the Clayton Act "into a single section, § 1964." Resp. Br. 43 n.54 (emphasis added). But there is no trace in Section 1964 of the "language" of Section 16 (which *expressly authorizes* private injunctive relief under the Clayton Act). Congress rejected repeated proposals to add a provision like Section 16 to civil RICO. See 01-1118 Pet. Br. 38, 41, 45-47.

3. *The Legislative History*. Multiple proposals were presented to both the House and the Senate – during RICO's consideration and in succeeding Congresses – that would have expressly authorized private injunctive relief. See 01-1118 Pet. Br. 45-48; 01-1119 Pet. Br. 15-18 & n.16; U.S. Br. 12-13. Respondents take issue with the idea that Congress "rejected" these proposals. While it is true that (except for the Senate's vote in 1972) the House and Senate never took formal votes on these proposed amendments, it cannot be disputed that the option of authorizing private injunctive relief was presented again and again in House and Senate committees as well as on the floor, and that both chambers ultimately chose a competing alternative. 01-1118 Pet. Br. 45-46. Under this Court's cases, that is significant. *Id.* at 48 (citing cases).

Respondents also dispute the significance of our showing that Section 1964(c) was "a branch grafted onto the already-completed trunk of the statute." *In re Fredeman Litig.*, 843 F.2d 821, 829 (5th Cir. 1988). But we are not suggesting that Section 1964(c) must "be read in a vacuum, as if § 1964(a) were not part of the statute." Resp. Br. 46. What we *are* saying is that Section 1964(c)'s origin as an add-on provision refutes the Seventh Circuit's premise that Section 1964(c) bears exactly the same relationship to Section 1964(a) as does Section 1964(b). See 01-1118 Pet. Br. 43-44. That flawed premise also disregards the fact that subsections (a) and (b) originated in a single provision of the Sherman and Clayton Acts.

4. *The Liberal Construction Clause and Inherent Powers*. According to respondents (at 40-41), this Court in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), pointed to RICO's liberal

construction clause and underscored "the importance of broadly construing RICO's remedies section." Like the Seventh Circuit (01-1118 Pet. App. 10a), however, respondents selectively quote from *Reves*, which *rejected* an argument based on the clause. Respondents also omit this Court's statement that the "purposes Congress had in mind * * * must be gleaned from [RICO] through *the normal means of interpretation*." 507 U.S. at 183-84 (emphasis added); see also *Holmes*, 503 U.S. at 274.[16]

Equally meritless is respondents' invocation (Br. 38-39) of federal courts' "inherent powers" as a reason to disregard the strong evidence that Congress never intended to authorize private injunctive relief. The principle underlying *Bell* v. *Hood*, 327 U.S. 678 (1946), is limited to *compensatory* relief for plaintiffs who otherwise would be left without any remedy. See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2130 (2002).[17] Nor is *Franklin* v. *Gwinnett County*, 503 U.S. 60 (1992), of help to respondents. *Franklin*, like *Bell*, deals with remedial questions in the context of a right of action that has been *implied* by the judiciary (and in any event it authorizes judicial recognition of "appropriate" remedies only, see 503 U.S. at 73). In RICO, by contrast, Congress has (1) expressly created a private right of action under Section 1964(c); (2) specified the remedies that are available in such an action; and (3) authorized the government

---

[16] In addition to *Reves*, respondents cite six of this Court's cases in support of their argument based on the liberal construction clause. Br. 40 & n.52. But only two of those cases even mention the liberal construction clause – and neither supports respondents' position. In *United States* v. *Turkette*, 452 U.S. 576, 587 (1981), the Court stated that it would have reached the same conclusion "[w]ith or without" the clause. And in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), the Court cited the clause only after it had determined that there was "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." *Id.* at 495.

[17] Respondents attempt (Br. 39-40 n.51) to distinguish *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), on the ground that it involved the "right to sue," not remedial issues. The argument overlooks this Court's teaching that the "statutory structure" is "pertinent not only to the scope of the implied right, but also to the scope of the available remedies." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998).

to institute other proceedings in which different remedies are available. See *Lane* v. *Peña*, 518 U.S. 187, 197 (1996) (presence of express remedies provision "brings this case outside the 'general rule' * * * discussed in *Franklin*").

Lastly, there is no merit to respondents' reliance (at 38-39) on the "historic equitable" powers of the federal courts. Those background principles did not carry the day in construing the Sherman Act's remedies (see pages 15-16, *supra*), or in *Grupo Mexicano*, and they should not here either. Moreover, this case is readily distinguishable from *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), which turned on the complete absence of any evidence in "either the [statutory] language or the legislative history" of an intent on Congress's part to preclude injunctive relief. And cases such as *Califano* are fundamentally different because they involved arguments that particular statutory provisions categorically barred the federal courts from exercising their traditional equitable authority. But Congress has not precluded the federal courts from exercising their equitable powers in all civil RICO cases; it has simply insisted that these powers be invoked by the federal government only.

* * * * *

As respondents have candidly admitted (Br. in Opp. 15), the Court's resolution of this case will not materially diminish the statutory protections available in the future to abortion clinics or their patients. The FACE Act, 18 U.S.C. § 248, forbids the actual or attempted interference, through "threat of force or by physical obstruction," with "any person because that person is or has been * * * obtaining or providing reproductive health services." *Id.* § 248(a)(1). It not only imposes criminal penalties (although less severe ones than the Hobbs Act) but also authorizes private civil actions for compensatory and punitive damages and for "temporary, preliminary, or permanent injunctive relief." *Id.* § 248(c)(1)(B). The FACE Act, in short, is everything RICO and the Hobbs Act are not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

OCTOBER 2002

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(10)

No. 01-1118

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22901
Tel.: (434) 978-3888

Jamin B. Raskin
(*Counsel of Record*)
WASHINGTON COLLEGE OF LAW
4801 Mass. Ave., NW
Washington, DC 20016
Tel.: (202) 274-4011

July 12, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE "INTANGIBLE RIGHTS" THEORY OF EXTORTION REVIVES ABSTRACT *LOCHNER*-ERA NOTIONS OF ABSOLUTE PROPERTY RIGHTS WHICH ARE NO LONGER VALID AND WILL DETER PUBLIC OPPOSITION TO BUSINESS. 6

II. THE "INTANGIBLE-RIGHTS" THEORY OF "EXTORTION" WILL DETER PUBLIC OPPOSITION TO BUSINESS. 11

III. BY ADOPTING THE HOBBS ACT'S CRIMINALIZATION OF "EXTORTION" AS THE "OBTAINING OF PROPERTY FROM ANOTHER, WITH CONSENT" WHERE SUCH CONSENT "IS INDUCED BY THE WRONGFUL USE OF ACTUAL OR THREATENED FORCE, VIOLENCE, OR *FEAR*," THE SEVENTH CIRCUIT'S DECISION INTRODUCES SUBSTANTIALLY VAGUE AND OVERBROAD JUDICIAL RESTRICTIONS ON ACTIVITIES OF POLITICAL PROTESTORS 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Callanan v. United States, 223 F.2d 171 (8th Cir. 1955) 14, 15

Carbo v. United States, 314 F.2d 718 (9th Cir. 1963) . 15

Drake v. B.F. Goodrich Co., 782 F.2d 638 (6th Cir. 1986) 9

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 8

Genty v. Resolution Trust Corp., 937 F.2d 899 (3rd Cir. 1991) 9

In re Jensen, 995 F.2d 925 (9th Cir. 1993) 9

Lochner v. New York, 198 U.S. 45 (1905) 7, 13

Lucero v. Trosch, 121 F.3d 591 (11th Cir. 1997) 1

Monterey Plaza Hotel Ltd. Partnership v. Local 483, 215 F.3d 923 (9th Cir. 2000) 10, 11

NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) 2, 8

National Org. of Women v. Scheidler, 1997 WL 610782 (N.D.Ill. 1997) 4

New York Times v. Sullivan, 376 U.S. 254 (1964) 6

New York v. Operation Rescue, 80 F.3d 64 (2nd Cir. 1996) 1

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8

NOW v. Scheidler, 510 U.S. 249 (1994) 1, 3, 4

NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) ... 5

NOW, Inc. v. Scheidler, No. 86-C-7888, 1999 U.S. Dist. LEXIS 11980 (N. Dist. Ill. July 28, 1999) 4

Ohio v. Kovacs, 469 U.S. 274 (1985) 9

Oscar v. University Students Co-op Ass'n, 965 F.2d 783 (9th Cir. 1992) (*en banc*) 9, 13

Palmetto State Medical Center v. Operation Lifeline, 117 F.3d 142 (4th Cir. 1997) 1, 4

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 17

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 8

Planned Parenthood v. American Coalition of Life Activists, 945 F.Supp. 1355 (D.Or. 1996) 4

Reves v. Ernst & Young, 507 U.S. 170 (1993) 10

United States v. Billingsley 474 F.2d 63 (6th Cir. 1973) 15

United States v. Brecht, 540 F.2d 45 (2nd Cir. 1976) .. 12

United States v. Jones, 529 U.S. 848 (2000) 18

United States v. Lew, 875 F.2d 219 (9th Cir. 1989) 11

United States v. Russo, 708 F.2d 209 (6th Cir. 1983) 16, 17

United States v. Sander, 615 F.2d 215 (5th Cir. 1980) 16

United States v. Stillo, 57 F.3d 553 (7th Cir. 1995) 6

United States v. Tolub, 309 F.2d 286 (2nd Cir. 1962) . 15

Veneklase v. City of Fargo, 78 F.3d 1264 (8th Cir. 1996), *cert. den.*, 519 U.S. 867 (1996), further appeal at 248 F.3d 738 (11th Cir.) (*en banc*), *cert. den.*, 122 S.Ct. 42 (2001) 1

West Hartford v. Operation Rescue, 991 F.2d 1039 (2nd Cir. 1993) 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

15 U.S.C. § 1113 10

18 U.S.C. § 1951(b)(2) 7, 10, 14

18 U.S.C. § 1341 11

18 U.S.C. § 1343. 11

18 U.S.C. § 1961(1) 11

18 U.S.C. § 1961(5) 3

18 U.S.C. § 1962(c) 3

18 U.S.C. § 1964(c) 4, 12

Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) ..... *passim*

MISCELLANEOUS AUTHORITY

Angela Hubbell, *FACEing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protesters*, 21 OHIO N.U. L. REV. 1061 (1995) 3

Comment, *Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?*, 21 Ohio N.U. L.Rev. 995 (1995) 3

J. Raskin and C. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AMERICAN U. L.R. 179 (2001) 6

John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991) 1

L. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L.REV. 853 (1999) 5

Note, *Stretching RICO to the Limit and Beyond*, 45

DUKE L.J. 819 (1996) 12, 13

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several significant First Amendment cases, including parties in the prior appearance of the instant case before the Court, *NOW v. Scheidler*, 510 U.S. 249 (1994). Rutherford Institute affiliate attorneys have defended the First Amendment rights of pro-life protestors in numerous other lower court cases as well.[2]

Co-Counsel for *amicus* Jamin B. Raskin is a professor of constitutional law at American University, Washington College of Law, and Co-Director of its Program on Law and

---

[1] Counsel of record to the parties in this case have consented to the filing of all *amicus curiae* briefs on behalf of any party, pursuant to blanket consents filed with the Court on May 8, 2002 (Petitioners' counsel) and May 9, 2002 (Respondents' counsel). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Palmetto State Medical Center v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *West Hartford v. Operation Rescue*, 991 F.2d 1039 (2nd Cir. 1993); *New York v. Operation Rescue*, 80 F.3d 64 (2nd Cir. 1996); *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997); *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996), *cert. den.*, 519 U.S. 867 (1996), further appeal at 248 F.3d 738 (11th Cir.) (*en banc*), *cert. den.*, 122 S.Ct. 42 (2001). *See generally* John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991).

Government.

The Court's *amicus* will address its arguments solely to the second Question Presented in No. 01-1118, whether the Hobbs Act criminalizes the activities of political protestors who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there. *See* Petition for Writ of Certiorari, at i. This question raises the extremely important issue of whether there exist constitutional limits to the use of the civil tort system to exact speech-chilling sanctions against protestors for aggressive speech on politically divisive issues, on the dubious basis that such protestors are "extorting" an intangible property right or civil right possessed by the business and its customers.

SUMMARY OF ARGUMENT

Amicus respectfully submits that the Seventh Circuit's longstanding view that mere apprehension of loss of business due to the actions of Hobbs Act defendants is sufficient to give rise to liability under the Act, reiterated in *Scheidler II* and applied to political protestors, perpetuates archaic *Lochner*-era notions of "intangible property rights," and criminalizes the infringement upon such intangible rights by conduct that historically has been viewed as protected under the First Amendment. *See NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

ARGUMENT

Abortion clinics frequently seek to employ the civil liability provisions of the RICO Act[3] as a tool for limiting abortion

[3] 18 U.S.C. § 1962(c).

protests. RICO was enacted with broad language in the intent to provide claimants and courts with all the tools necessary to combat the economic effects of organized crime. The salient provision of RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt."[4] A "pattern" of RICO activity occurs if two "predicate acts" are committed within a ten-year span.[5]

In *Scheidler I*, the Supreme Court unanimously rejected the argument that RICO could not be construed to apply to political protestors because they lacked an economic motivation to constitute an "enterprise" under RICO. 510 U.S. at 258-259. The Court as a whole did not address RICO's potential chilling effects upon free speech or associational rights. However, Justice Souter, concurring, recognized that RICO had the potential to infringe upon legitimate free speech rights. *Id.* at 806, n.6 (Souter, J., concurring). As one commentator noted after *Scheidler I*, it would appear that "any politically unpopular protest movement with resulting property damage or technical trespass can be elevated to a federal crime."[6] Due to the uncertain limits of RICO, many abortion protesters are hesitant to engage in expressive activity out of

[4] 18 U.S.C. § 1962(c).

[5] 18 U.S.C. § 1961(5).

[6] Angela Hubbell, *FACEing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protesters*, 21 OHIO N.U. L. REV. 1061, 1067 (1995). *See also* Comment, *Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?*, 21 Ohio N.U. L.Rev. 995 (1995).

fear of being subjected to RICO liability. RICO can be particularly intimidating because of the potential assessment of triple damages, the stigma facing racketeering charges, and the possible legal costs that could be involved.[7] Since *Scheidler*, several courts have ruled on the merits of RICO claims against pro-life protesters, with varying (and sometimes conflicting) results.[8]

Scheidler II now reviews the Northern District of Illinois' judgment against three pro-life protest leaders and their organizations for their efforts to demonstrate outside Chicago area abortion clinics. The Petitioners were ordered to pay over eighty-five thousand dollars to two abortion clinics, which award was trebled pursuant to RICO.[9] Although the Respondents neither alleged nor proved that Petitioners were personally directly responsible for the alleged acts of federal and state extortion that formed the predicate offenses necessary to prove a RICO enterprise existed, the court allowed them to link to Petitioners various violent acts committed by other anti-

---

[8] 18 U.S.C. § 1964(c).

[7] *See, e.g., Palmetto State Med. Ctr. v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (no evidence existed to show that Operation Lifeline or any of the individual defendants engaged in any illegal activities on the particular dates alleged by the plaintiff-hospital); *Planned Parenthood v. American Coalition of Life Activists*, 945 F.Supp. 1355 (D.Or. 1996) (plaintiffs adequately stated RICO claims against all defendants but one); *National Org. of Women v. Scheidler*, 1997 WL 610782 (N.D.Ill. 1997) (permitting certain RICO claims to proceed against defendants, while granting judgment for plaintiffs on other RICO claims).

[9] *NOW, Inc. v. Scheidler*, No. 86-C-7888, 1999 U.S. Dist. LEXIS 11980 (N. Dist. Ill. July 28, 1999).

abortion protesters who were not parties to the case.[10]

The Seventh Circuit Court of Appeals affirmed the decision.[11] On the key issues that have now been presented to the Supreme Court, the Seventh Circuit ruled in favor of NOW. The appeals court held that violations of the federal extortion law, the Hobbs Act, could establish that there were "predicate acts" of racketeering committed, even though the Hobbs Act requires proof that the accused individuals sought to obtain "property" of another person – clearly not the intent of the protesters. 267 F.3d at 709.

> [Petitioners'] primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things [Respondents] claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, *see, e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

267 F.3d at 709. The Seventh Circuit likewise reiterated its

---

[10] *See* L. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L.REV. 853, 888 (1999).

[11] *NOW, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001).

prior holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Id.*, citing *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995).

The Court's *amicus* urges that, for the reasons discussed herein, the Court of Appeals' broad reading of the definition of "extortion" under the Hobbs Act, coupled with the historically expansive reading of the term by other Circuits construing the Act, poses an unacceptable threat to the First Amendment free speech rights of protestors and demonstrators across the political spectrum. Conceivably, the Court of Appeals' decision could chill not only pro-life protestors, but union organizers and picketers, civil rights activists, environmental activists and globalization opponents. The resulting landscape of public fora, though undoubtedly quite a bit more peaceable, would in no way resemble the places for "robust, uninhibited and wide-open"[12] debate the First Amendment was intended to protect.

I. THE "INTANGIBLE RIGHTS" THEORY OF EXTORTION REVIVES ABSTRACT *LOCHNER*-ERA NOTIONS OF ABSOLUTE PROPERTY RIGHTS WHICH ARE NO LONGER VALID AND WILL DETER PUBLIC OPPOSITION TO BUSINESS.

The fundamental error in the Seventh Circuit's decision is that it creates out of thin air a federal common law of

[12] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). *See* J. Raskin and C. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AMERICAN U. L.R. 179 (2001).

intangible property rights that is radically more expansive than the law recognizes in any other context. "Obtaining property" illegally as extortion has to mean something more than simply interfering with or affecting another's exercise of his property rights. The intangible right not to have a business affected by outside influence is not, and would not, be recognized as "property" under the Fifth Amendment Takings Clause, environmental law, bankruptcy law, or RICO's "enterprise" requirement.

The Hobbs Act defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). *Scheidler II* defines the "obtaining of property" as encompassing protestors' deprivation of a business' right to operate free of interference, and its customers' right to receive such services. 267 F.3d at 709. But the protestors have not "obtained" anything unless it is the imagined "property" interest in the abstract not to be interfered with by political opponents. This hopelessly circular definition of "property" would transform all simple torts at the state level into federal extortion. It is a doctrinal move of breathtaking dimension that would be rejected in every other area of the law.

The notion that an outsider "takes" property whenever she influences a business's decisions is the same theory of absolute property rights espoused in *Lochner v. New York*, 198 U.S. 45, 63-64 (1905). In *Lochner*, the Court held that a law restricting a business' right to operate as it saw fit was a deprivation of a constitutionally protected business right without substantive due process. *Id.*

Lochner is no longer the law. When government restricts how a business may conduct its affairs, this restriction is not a

"taking of property" unless the owner has been substantially dispossessed of his land. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) and cases cited therein. Even though the regulation may remove one stick in the business's bundle of rights, it is not a "taking of property," even if the business's prohibited conduct was not inherently blameworthy or noxious. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-131, 133 n.30 (1978). *Penn Central* recognized that the 19th century regime of absolute property rights is over. Businesses are influenced by a multitude of pressures, including government regulation and outside protest. *Cf. NAACP v. Claiborne Hardware*, 458 U.S. at 913 ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."); *cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (railroad company had right to attempt legislative change to trucking regulations, although its purpose in doing so was anticompetitive). This does not mean that the business has been dispossessed of its property every time it experiences outside influence.

The Takings Clause provides a good litmus test for the phrase "obtaining property." If the government ordered the Respondent health clinics to stop performing abortions altogether, the clinics would nonetheless have no "taking of property" claims under the Fifth Amendment (although they might have First and Fourth Amendment claims under *Roe v. Wade*). Likewise, if the National Labor Relations Board ordered an employer to recognize a union or to change its employment practices, it would not have a "taking of property" claim.

The intangible right to influence a business' conduct is also not recognized as "property" under environmental law. For

example, citizens who claim the right to restrain a business's toxic dumping do not possess by virtue of that right any "property" right over the offending business that would entitle them to the extra remedies of RICO. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3rd Cir. 1991) (unlawful toxic dumping not remediable under RICO) and *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (same), *cited in Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992) (*en banc*). If the Seventh Circuit's view applied consistently, neighbors of a polluting business *would* have an intangible property interest in the offending business, simply because they claim a legal power to restrain the business's conduct of its affairs. If a legal claim to control a business' toxic dumping does not confer "property" on environmentalists under RICO, then RICO cannot consistently label them as extortionists seizing an "intangible property right" when they picket or protest to achieve the same end.

Likewise, bankruptcy law treats a business's promise to modify its conduct as only a contractual obligation, not a *property* interest of the promisees. For example, a business's obligation to clean up toxic wastes does not make the affected neighbors into secured lienholders in its property if the business goes bankrupt. Persons affected by a business' toxic waste have no secured property right over the business. A bankrupt business may normally liquidate its clean-up obligations and discharge them as an unsecured claim in bankruptcy. *See Ohio v. Kovacs*, 469 U.S. 274, 282 (1985); *In re Jensen*, 995 F.2d 925, 929-931 (9th Cir. 1993).

This fact shows the inconsistency in the Seventh Circuit's intangible rights theory of property. If environmentalists succeed in compelling a business to change its conduct (*e.g.*, by signing a code of clean business conduct), they have not obtained a secured property right (like a lien) that would be

recognized in bankruptcy proceedings. If a labor union forces a business to sign a collective bargaining agreement, that agreement is not a secured property right, even though it restricts how the business conducts its affairs. The bankrupt business may reject those agreements under certain conditions, *see* 15 U.S.C. § 1113, as it could not with a property lien held by a secured creditor. Yet *Scheidler II* holds that protestors who seek to induce concessions from health care providers *are* "obtaining property" in violation of the Hobbs Act if they commit any civil wrong in their protests. This is an inconsistent doctrine.

The Supreme Court implicitly rejected the "intangible property rights" theory in deciding when outsiders can be said to "conduct[ ] or participat[e], directly or indirectly, in the conduct of an enterprise" in *Reves v. Ernst & Young*, 507 U.S. 170, 184-185 (1993). *Reves* held that outsiders who harm a business cannot be said to "conduct or participate," even indirectly, in the conduct of the business' affairs within the meaning of RICO, 18 U.S.C. § 1962(c). Only actual insiders meet that test. *See* 507 U.S. at 185. *Reves*' interpretation of 18 U.S.C. § 1962(c) cannot be ignored in construing the Hobbs Act, 18 U.S.C. § 1951(b)(2). The statutes involve the same concept: when does a tort-feasor obtain the business that she harms? If the intangible-rights theory of extortion were valid, the Supreme Court could not have rejected the plaintiff's theory of "enterprise" in *Reves*. Harming a business would have been the same as obtaining an intangible control over the business. This was rejected in *Reves*, yet this is the theory of "obtaining property" revived here.

The Ninth Circuit Court of Appeals properly saw through this argument in *Monterey Plaza Hotel Ltd. Partnership v. Local 483*, 215 F.3d 923 (9th Cir. 2000). *Monterey Plaza* concerned an employer's attempt to employ a similar rationale

to impose RICO liability upon a labor union based on predicate acts of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. 215 F.3d at 926-927. The statutes at issue were designed to prevent deceptive communications by wire, radio or television. They explicitly require an intent to obtain "money or property [from the one who is deceived] by means of false or fraudulent pretenses, representations, or promises." §§ 1341 and 1343; *see United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989). The Ninth Circuit held:

> The Union did not obtain property by deceiving the Hotel or its customers; the Union was simply carrying on a strategy in a protracted labor dispute. *The Union's conduct may have been vexatious or harassing, but it was not acquisitive. The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings.*

Id. at 927 (emphasis added). The Court should take the same cautious road as the Court of Appeals in *Monterey Plaza*, recognizing that a regime that punishes speakers for intangible harms is simply too evanescent to administer without certain damage to the cherished right to protest.

II. THE "INTANGIBLE-RIGHTS" THEORY OF "EXTORTION" WILL DETER PUBLIC OPPOSITION TO BUSINESS.

The Seventh Circuit's expansion of the Hobbs Act makes a difference only when *the challenged conduct is not otherwise a RICO predicate act*. When a defendant commits crimes that are independently punishable by more than a year's imprisonment, *see* 18 U.S.C. § 1961(1), the RICO plaintiff does not need to rely on the Hobbs Act to claim them as

predicate acts. The expanded use of "extortion" theories will only be relevant when the alleged misconduct is too minimal to trigger RICO on any other ground.

The Hobbs Act does not define any minimum threshold for "extortion." Before civil RICO, courts tried to contain the application of the Hobbs Act by admonishing prosecutors to invoke it only for serious offenses. *See, e.g., United States v. Brecht*, 540 F.2d 45, 52 n.14 (2nd Cir. 1976) (instructing U.S. Attorney to "exercise careful judgment" in deciding whether to commence a federal prosecution for conduct so close to a state-law misdemeanor). This was only a plea for moderation, not a rule of law. After the explosion of civil RICO, courts can no longer count on neutral prosecutors to keep the Hobbs Act within reasonable limits. Unlike United States Attorneys, private businesses suing their adversaries under civil RICO have no public duty to confine their extortion charges to "really serious" conduct.

Furthermore, businesses that want to rid themselves of activists will have every incentive to make out "extortion" claims against them, even for minimal or non-existent wrongs. Because RICO provides for mandatory attorneys' fees to a prevailing plaintiff, 18 U.S.C. § 1964(c), proof of even nominal damages will impose a ruinous attorneys' fee liability on the protestor to pay the business's corporate lawyers. There is no similar provision for fees to prevailing RICO defendants if the suit turns out to be baseless.

This means that businesses can use intangible-rights extortion charges to drive their opponents out of the public arena. "It is not difficult to imagine what impact RICO would have had on Dr. King's Southern Christian Leadership Council. Segregationist forces could have used the extraordinary damages provision to cut the financial legs out from under the

movement." Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 821 (1996). The activist organization does not have an equivalent RICO remedy for the business's crimes and torts, because ordinary citizens have no RICO-enforced "intangible property rights" against wrongs committed for *pro*-business (and anti-union or anti-environmental) motives. *See Oscar*, 965 F.2d at 785-786.

This outcome is not Congress' fault. So long as the courts stick to the plain meaning of the phrase "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," the Hobbs Act does not lend itself to the suppression of social activism. This language addresses something more than interference with a business – it requires the outright expropriation of property from a victim, with the victim's coerced consent. No other area of the law would accept the outrageous "intangible rights" theory of property advanced here, which is nothing less than the criminal-law ghost of *Lochner*.

III. BY ADOPTING THE HOBBS ACT'S CRIMINALIZATION OF "EXTORTION" AS THE "OBTAINING OF PROPERTY FROM ANOTHER, WITH CONSENT" WHERE SUCH CONSENT "IS INDUCED BY THE WRONGFUL USE OF ACTUAL OR THREATENED FORCE, VIOLENCE, OR *FEAR*," THE SEVENTH CIRCUIT'S DECISION INTRODUCES SUBSTANTIALLY VAGUE AND OVERBROAD JUDICIAL RESTRICTIONS ON ACTIVITIES OF POLITICAL PROTESTORS.

Even assuming that the intangible-rights theory applies to the actions of Petitioners and others similarly situated, the term "fear" is substantially vague and overbroad as construed by the Circuit Courts of Appeal and is in critical need of clarification

by the Supreme Court to provide clear guidelines when the Hobbs Act is applied, if at all, to political protestors. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, *or fear*, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). The Hobbs Act element of fear has been interpreted in various ways by the Circuit Courts of Appeal. Although some Circuits are similar in their application of the Hobbs Act, they differ in how they determine the degree of reasonableness of the fear that is generated in the victims. Some Circuits require actual knowledge that adverse action will result if the victim fails to comply with requests made by the defendants, while others merely require that the victim felt fearful, and that the defendant was of the sort of character that would exploit such fear.

In *Callanan v. United States*, 223 F.2d 171 (8th Cir. 1955), a mere conversation between a labor representative and an employer was found to induce reasonable fear in the employer on the part of the organizer. 223 F.3d at 176. The employer vocalized his fears concerning the quality of work he would receive from the organizer's labor pool and the organizer suggested a price that the employer could pay so his fears would not be realized. *Id.* at 175. The employer agreed on a certain price after some negotiation with the organizer. *Id.* The court held that the offense of extortion had been committed if the defendants "illegally created fear in the victim, which fear has induced the victim to part with his money or property," regardless of whether the defendant was responsible for "any past activities in the way of prior illegal strikes or unfair labor practices which may have created the fear, or whether the fear may have been created by what might have happened to others in similar cases." *Id.* In other words, extortion may be found absent a direct threat; the defendant

need only play on the victim's fear – based on circumstances not of the defendant's making – in order to obtain the property.

The Second Circuit followed the Eighth Circuit's reasoning in *Callanan*, and further elaborated on the reasonableness of fear by the victim, in *United States v. Tolub,* 309 F.2d 286 (2nd Cir. 1962). The Second Circuit found that the evidence submitted as to the reasonableness of the victim's fear was sufficient, which included the testimony by the victim that he was "overwrought" because he felt he had to pay money to the defendant, a union organizer. *Id.* at 288. The court also held that there was sufficient evidence from which a jury could find that Tolub was in a position of harm, and fear of such harm was reasonable. *Id.* This evidence included Tolub's duties, which showed that he was in a position to "influence the employees, to cause slowdowns and stoppages," even if such acts were not approved by the union. *Id.* at 289. The court affirmed that the jury was able to find inducement of fear from the testimony of the victim as to state of mind. *Id.* Also, if the victim knew of the position of the defendant as a union official, "deliberately imposed fear" could be inferred solely based on that position. *Id.*

Similarly, in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), the Court allowed evidence a defendant's bad moral character because it showed the defendant's alleged plan to instill fear and the subsequent generation of fear in the victims. In *Carbo*, boxing promoters linked with organized crime attempted to gain control of the boxers themselves along with the rights to showcase the boxer's fights by intimidation of the boxer's managers and extortion of funds. The court held that the prosecutor must prove that the victims considered this defendant to "be dangerous and that fear reasonably resulted." *Id.* at 741. *See also United States v. Billingsley* 474 F.2d 63 (6th Cir. 1973) (character evidence admissible of a labor

organizer to show generation of fear in victim).

The Fifth Circuit has read the Hobbs Act even more liberally, holding that the Government need not show that fear was a direct consequence or that the victim personally feared the Defendant. *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980). The Court found an extortionate act when a zoning board member informed a land developer that the payment of $10,000 would ensure a favorable vote and may eliminate any trouble he could encounter in obtaining a zoning permit. *Id.* at 217. The Court classified this act to be a "subtle extortion" since the victim did not actually fear the defendant, but rather feared economic harm. *Id.* at 218. The Court further held that the Government satisfies its burden of proof if the circumstances surrounding the alleged acts render the victim's fear reasonable. *Id.* The plaintiff faced a potential loss of millions of dollars, which induced him to part with his money, and the Court held this uncertainty to be a threat adequate to establish reasonable fear. *Id.* at 219.

The most in depth explanation of the element of fear as used in the Hobbs Act derives from jury instructions affirmed by the Sixth Circuit in *United States v. Russo*, 708 F.2d 209 (6th Cir. 1983). In *Russo*, the defendants were charged with violations of the Hobbs Act for forcing an employer to make payments to a union pension and welfare fund. *Id.* at 210. The jury instructions stated in part:

> Fear is a state of anxious concern, alarm or apprehension of anticipated harm. *It does not necessarily refer to physical fear or fear of violence. It includes fear of economic loss.* It exists if you find beyond a reasonable doubt that by threats of the defendant, fear of economic loss was created in the victim's mind, or that the defendants knowingly and willfully used the victim's fears of economic loss; and under the circumstances it was reasonable for the victim to have such fear; and that the defendant made use of such fear to extort or attempt to extort.

Id. at 213. The Court of Appeals held that the instructions properly required only a finding of fear of economic loss. *Id.* The opinion drew a cautionary concurrence by District Judge Holschuh, who admonished that aggressive labor protest not be chilled by RICO liability:

> In labor's struggle for higher wages and better working conditions and in management's efforts to minimize labor costs, the use of threats of economic loss is commonplace. Employees threaten to shut down an employer's plant by strike if their demands for higher wages are not met; employers in today's economy have threatened to shut down their own plants if employees do not agree to reduce their wages.... This case... may be the first case in which the Hobbs Act has been held to apply to activities between an employer and the employer's own employees while engaged in an attempt to resolve a labor dispute over terms and conditions of employment. The ramifications of the majority opinion are both far-reaching and, to me, troublesome for both labor and management.

708 F.3d at 216-217 (Holschuh, *D.J.*, concurring in result) (citation and footnotes omitted).

CONCLUSION

The federal courts should not interpret a federal statute to take over and swallow up an entire field of state regulation absent explicit Congressional direction. *See Patterson v.*

McLean Credit Union, 491 U.S. 164, 183 (1989) (42 U.S.C. § 1981 will not be read to cover all claims for breach of contract involving racial animus, since this would federalize state law without clear Congressional authority and direction); *United States v. Jones*, 529 U.S. 848 (2000) (Commerce Clause authority does not permit Congress to enact federal criminal legislation based upon conduct historically within the authority of States to penalize). This reasoning applies equally here. Even the most minimal intrusions upon property interests – those merely sufficient to give rise to a cognizable apprehension of loss of business – would become predicate acts of "extortion" sufficient to subject protestors to federal racketeering judgments, since such conduct would deprive the business of an intangible right to operate free of disruption. The federal courts should not read a federal statute this broadly without clear authority from Congress. For the reasons stated above, the Court of Appeals should be reversed.

Respectfully submitted,

Jamin B. Raskin
(*Counsel of Record*)
WASHINGTON COLLEGE OF LAW
4801 Massachussetts Ave., NW
Washington, DC 20016
Tel.: (202) 274-4011

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
112 Whitewood Rd.
Charlottesville, VA 22901
Tel.: (434) 978-3888

July 12, 2002

Supreme Court, U.S.
FILED
MAY 21 2002
OFFICE OF THE CLERK

01-1118 and 01-1119

IN THE SUPREME COURT OF THE UNITED STATES

01-1118

Scheidler, et al.,

Petitioners,

v.

N.O.W., et al.,

Respondents.

and

01-1119

Operation Rescue,

Petitioner,

v.

N.O.W., et al.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Seventh Circuit

---

Brief *Amici Curiae* of **TEXAS BLACK AMERICANS FOR LIFE** and **L.E.A.R.N. (the Life Education And Resource Network)** In Support of Neither Party.

Lawrence J. Joyce, Esq.
Counsel of Record
(520) 584-0236

445 N. Wilmot Rd., #126
Tucson, AZ 85711
LawyerLJ@AOL.com

609

INTEREST OF THE *AMICI*

The *amici* are organizations of African-Americans which conduct demonstrations in front of abortion clinics and participate in sidewalk counseling of mothers and their associates approaching such clinics. We expect these activities to be affected by the cases at bar. Had the Court accepted the First Amendment issues, the *amici* would have filed a brief in support of the petitioners. However, in deference to this Court's decision not to take those issues, we focus instead on the wording of what the Court says in these cases rather than on this Court's actual holding itself in order to help ensure that the Court's opinion will not conflict with the Court's own First Amendment jurisprudence.

SUMMARY OF ARGUMENT

To avoid the First Amendment issues, the Court must not imply that the government may now prohibit by civil actions any conduct which it may not, under the First Amendment, prohibit by criminal law. To do otherwise would run afoul of this Court's holding in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This would also run afoul of *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Boyd v. U.S,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Also, undermining both *Sullivan* and *Gault* at the same time, both of which are "Warren Court" cases, may be perceived as a political attack.[1]

ARGUMENT

TO AVOID THE FIRST AMENDMENT ISSUES, THE COURT'S OPINION MUST NOT CONFLICT WITH *New York Times v. Sullivan.*

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this Court said, with respect to freedom of speech protected by the First Amendment,

> "What a State may not constitutionally bring about by

[1] As per Rule 37.6: Counsel of record is the sole author of this brief. No monetary contribution was made toward its preparation or submission by any one other than the *amici*, the members thereof, or counsel of record.

means of a criminal statute is likewise beyond the reach of its civil law of libel." Sullivan, 376 U.S. at 277, 84 S.Ct. at 724, 11 L.Ed.2d at 705.

As this Court explained:

> "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. [citation omitted] ... And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." Sullivan, 376 U.S. at 278, 84 S.Ct. at 724-725, 11 L.Ed.2d at 705.

This Court then used this same point of logic three years later in the field of juvenile justice. *In re* Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). As this Court said, concerning a juvenile's right against self-incrimination,

> "Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply." Gault, 387 U.S. at 49, 87 S.Ct. at 1455, 18 L.Ed.2d at 558.

The Court rejected this argument, saying,

> "To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." Gault, 387 U.S. at 49-50, 87 S.Ct. at 1455, 11 L.Ed.2d at 558.

Self-incrimination, of course, is entirely outside of the field of First Amendment jurisprudence. *A fortiori*, it would not be unprecedented for this Court to recognize the importance of this principle outside of the law of libel (the subject of *Sullivan*)

and recognize its importance in the cases at bar.

Years earlier, this same rationale also underpinned this Court's holding that any law which requires an adult to testify against himself outside of a criminal trial (though in a matter which could ultimately lead to a criminal trial) would have to afford the party a means of preserving his Fifth Amendment right not to testify against himself in any such later criminal proceeding. Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), U.S. v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

We wish to remind this Court of what it said in *Boyd*:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,---that is, civil in form,---can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens ...? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one... As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all purposes of ... the fifth amendment ... It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." Boyd, 116 U.S. at 634-635, 6 S.Ct. at 534-535, 29 L.Ed. at 752.

In the civil actions at bar, then---in which plaintiffs effectively act as private attorneys general---even the mere potential to run afoul of the First Amendment must be seen as being at least a threat of some kind to this Court's well-established law. This point is most strikingly seen with respect to *Sullivan*, in which

the newspaper and civil rights defendants were not even remotely acting in a manner similar to a private attorney general, and which had no quasi-criminal aspects to it. And thus, of all these prior cases, *Sullivan* is the one most placed at risk. For if the Court today by its silence on the First Amendment issues implies that even the cases at bar have no conflict with the First Amendment, how could one possibly then conclude that this Court would find no such conflict in *Sullivan*?

Avoiding any conflict with the First Amendment may be difficult to do, given the long, drawn-out legal battles which have already ensued. The difficulty may be even greater, given the fact that any alleged conduct herein not protected by the Free Speech Clause is readily severable from the protected conduct and thus can be adequately addressed by statute by other means. For this can be done without imposing upon those who engage in protected speech and conduct the threat of draconian remedies, especially a threat which exists in a legal system in which only expensive and time-consuming adjudication, it would seem, can ultimately sort out---*after the fact*---what conduct and speech are protected and what are not. And given the very recent ruling *en banc* by the Ninth Circuit on Free Speech issues in the so-called Nuremberg Files abortion protest web site case, the lower courts will be in even greater need of a clear, uncontradicted voice from this Court's precedents to guide them. Planned Parenthood v. American Coalition of Life Activists, No. 99-35320, slip op. (9th Cir. May 16, 2002).

Thus, to maintain the integrity of the First Amendment, while simultaneously avoiding First Amendment issues, the Court must now take care to ensure that nothing in its opinion shall imply that the Court is moving away from the reasoning of *Sullivan*, *Gault*, and *Boyd*, the great cost of the cases at bar and the years of litigating them notwithstanding.

We also ask the Court to bear in mind, in considering these cases, one very pertinent, important, and peculiar thing: None of these three lead cases, though they pursued parallel lines of thought, cited each other as an authority. *Sullivan* could have cited *Boyd* (and *Counselman*). *Gault* could have cited all three. And *Gardner* and *Kordel* could have cited *Sullivan* and *Gault*. Yet they did not.

What does this say to us? What is the message to be learned? It is not hard to see, for it is simply this: The principle that a government cannot do by its civil actions that which it cannot do by its criminal law is so well-rooted in our law---so intertwined as an inherent part of the logic and structure and the very fiber of our constitutional jurisprudence---that it may be picked up on in unrelated contexts without even a need to make reference to prior case law on point, and with counsel and the Court apparently even being completely oblivious to these prior cases.

Such a pattern as this---has the Court seen its like before? And if so, was such reasoning and well-rooted principle then simply abandoned? We should hardly think so then. And we certainly hope not now.

We therefore ask this Court to state expressly in its opinion specifically how it avoids the First Amendment issues and leaves *Sullivan* (as well as *Boyd* and *Gault*) fully intact; we also ask this Court to at least state, at a minimum, that it expressly reaffirms these prior cases. Failure to do so may lead to a line of cases in which the Court may be perceived as gradually moving away from these cases, leaving the status of all of them---or at least their potential application to new areas of law in future cases---weakened and in doubt.

In addition, given the fact that both *Sullivan* and *Gault* were from the so-called Warren Court, this Court must be mindful of the fact that any perceived disfavor toward the rationale of those cases might be deemed political in nature. And departing from the reasoning of even older precedent, unchallenged since *Boyd*, could be a further embarrassment to this Court.

CONCLUSION

We ask the Court to enter an appropriate order and opinion.

Respectfully submitted,
Lawrence J. Joyce
Counsel of record.

(12) (9)

Case No. 01-1118, 01-1119

Supreme Court, U.S.
FILED

JUL 2 2002

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

OCTOBER TERM 2001

JOSEPH SCHEIDLER, et al

AND

OPERATION RESCUE,

Petitioners,

VS.

NATIONAL ORGANIZATION FOR WOMEN, INC, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF CATHOLICS FOR LIFE, SACRAMENTO, AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONERS AND APPENDIX

JAMES JOSEPH LYNCH, JR.
Attorney at Law (Cal. SBN 85805)
2740 Howe Ave.
Sacramento, CA 95812-0336
(916) 921-1988
jjlynch@cwnet.com

Counsel for *Amicus Curiæ*

26 pp

Table of Authorities ii

INTEREST OF *AMICUS CURIÆ* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *STARE DECISIS* IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE 3

II. THE CONCEIVED UNBORN ARE PERSONS IN THE CONSTITUTIONAL SENSE BY VIRTUE OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION 4

A. THE CONSTITUTIONAL AND LEGAL FRAMEWORK 4

B. A CONCEIVED UNBORN IS LIFE WITHIN THE MEANING OF THE 5TH AMENDMENT 9

C. THE CONCEIVED UNBORN ARE ENTITLED TO PROTECTION 10

III. PETITIONERS HAVE A RIGHT TO USE REASONABLE FORCE TO PROTECT HUMAN LIFE; THE RECORD DOES NOT SUPPORT A CLAIM OF UNREASONABLE FORCE BY PETITIONERS 11

A. THE RIGHT TO DEFEND OTHERS, GENERALLY 11

B. FIRST AMENDMENT RIGHT TO SPEECH 11

C. THE RICO CLAIM 12

D. THE HOBBS ACT. 12

CONCLUSION 13

Table of Authorities

CASES

Alamo School Dirt. v. *Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960) 7, 8

Anderson v. United Realty Co., 79 Ohio St. 23, 86 N.E. 644, aff'd 222 U.S. 16 (1911) 9

Barber v. Pittsburgh, F. W. & C.RL Co., 166 U.S. 83 (1897) 9

Bolling v. Sharpe, 347 U.S. 497 (1954) 4

Bowers v. Hardwick, 478 U.S. 186 (1986) 13

Bray v. Alexandria, 113 S.Ct. 753 (1993) 1

Brown v. Board of Ed., 349 U.S. 294, 298 (1955) (*Brown III*) 4

Brown v. Bd. of Education, 347 U.S. 483 (1954) (*Brown II*) 4

Brown v. United States, 256 U.S. 335 (1921) 13

Chicago B. & *Q.* R.R. Co. v. Iowa, 94 U.S. 155 (1877) 6

Coggs v. Berherd, 2 Ed.Raym. 909 (1703) 9

Cruikshank, supra, 92 U.S. (2 Otto), at 549 12

Ex Parte Garland, 4 Wall. 333 (1867) 4

Field v. Clark, 143 U.S. 649, 691 (1891) 3

Flash v. Cohen, 392 U.S. 83 (1968) 12

Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 (1904) 8

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 6

Haward v. Howe, 12 Gray (Mass.) 49 *(1858)* 8

Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 (1900) 8

Hodgson v. Minnesota, 497 U.S. 417 (1990) 1

Katz v. United States, 389 U.S. 347 (1967) 12

Kay v. Scates, 37 Pa 31(1860) 8

Land v. Dollar, 330 U.S. 731 (1947) 6

Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926) 8

McIntosh v. Dill, supra, 205 P. 917 (1922) 8, 11, 12

Mullane v. Central Hanover B&T, 339 U.S. 706 (1950) 12

Planned Parenthood v. Williams, (1994) 7 Cal.4th 860 1

Plessy v. Ferguson, 163 U.S. 537 (1896) 4

Roe v. Wade, 410 U.S. 113 (1973) 2, 3, 4, 15

Scott v. Sanford, 60 U.S. (19 How.) 404 (1857) 5, 6

Sink/er v. Kneale, 401 Pa 267, 164 A.2d 93, 94 (1960) 8

Turnock v. Ragsdale, 503 U.S. 916 (1992) 1

United States v. Cruikshank, 92 U.S. (2 Otto) 542 ..... 5, 6

United States v. Cruikshank, 92 U.S. (2 Otto) 542, 550 (1876) 6

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 1

White v. Hart, 80 U.S. (13 Wall.) 646, 650 (1872) 8

Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) 14

Witters v. Washington Dept of Social Svcs for the Blind, 474 U.S. 481 (1986) 7

CONSTITUTIONS

United States

Preamble 5

Art. 01, Sec. 8, cl. 17 8

Art. 04, Sec. 2, cl. I 8

Art. 04, Sec. 3, cl. 2 8

Art. 06 6

Art. 06, cl 2 12

1st Amendment 14

3rd Amendment 9. 12

4rd Amendment 9

5th Amendment 4, 6, 9, 12

13th Amendment 5

14th Amendment 4, 5, 6

CODES

United States

18 U.S.C., § 1951) 15

MISCELLANEOUS

2 Farrand, Max, The Constitutional Debates 9

2 Stephens Commentaries 342 (1841) 11, 12

3 Blackstone's Commentaries 3 13

3 Rotunda, op cit., p. 663, note I 9

17 Halsbury's Laws of England (1st ed, 1911) Infants §§ 132, 135 11

17 Halsbury's Laws of England, Infants §§ 132, 135 (1st ed, 1911) 12

21 Exodus 22 7

28 AMERICAN JURISPRUDENCE, Second, Estates, § 53 9

3 Rotunda, Treatise on Constitutional Law § 23.33, p.

512 (1986) 3

31 *Corpus Juris Secundum,* Estates § 4 8

75 Landmark Briefs and Arguments of the Supreme Court of the United State 4

Aquinas, *Summa Theologiæ,* 1, q. 76, a. *5* and q. 118 7

Aristotle, *Politics,* VII, *1335b,* 24-26 7

Biology: Observation & Concept by Case & Steirs (1971) 10

Biology: Observation & Concept by Case & Steirs (1971), p. 110. 10

Biology: Observation & Concept by Case & Steirs (1971). 11

Bishop, Criminal Law § 877 (9th Ed., 1923) 13

Blackstone at Book IV, p. 198 7

Boyce & Perkins, Criminal Law and Procedure 819-20 (West, 7th ed 1989) 13

Chitty on Contracts (23rd Ed, 1968) 134 9

Foster, Crown Law 273-277 (1762) 13

Gray, The Rule Against Perpetuities (4th Ed.) 7, 8

Halsbury's Laws of England (1st Ed, 1911) Infants §*132, 135 8

Hobbes, Leviathan (1651) 9

I Kings 1-2 5

I Sam. 16 5

II Sam. 5, 9-20 5

International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 12

Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979) 11

Laqueur, THE-HUMAN RIGHTS READER (1979)..... 9

Locke, SECOND TREATISE OF GOVERNMENT (1690)..... 9

Lynch, "*Posterity: A Constitutional Peg for the Unborn*," 40 AJJ 401 (Notre Dame Law School. 1995)..... 2

Magna Carta (1215), Art. *54*..... 7

McKechnie, Magna Carta, Art. 41..... 6

Milton, John, AREOPAGITICA (1644)..... 7

Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965)..... 7

Restatement (2nd) Torts §§ 63, 64, & 65..... 13

Restatement, Contracts (1st) §77..... 9

Salmond, Torts 375 (11th Ed 1953.)..... 13

Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY..... 8

Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937..... 9

Verdross, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL 55 (1966)..... 9

BRIEF OF BRIEF OF CATHOLICS FOR LIFE, SACRAMENTO, AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Catholics for Life, Sacramento,[1] is a non-profit association formed to support women pregnancy crisis, and does support such women with birthing centers, counseling, pregnancy education, childcare, and related issues. The Association also carries on an active education campaign on pregnancy and abortion, for schools, groups and other interested persons by providing literature, public speakers, and other resources. The Association does carry on public demonstrations in a peaceful manner by praying the Rosary, and displaying placards and banners. The Association advocates non-violent resistance to abortion. Counsel for the Association is admitted the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Briefs in this court, and is published on the subject matter.[2] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He has written articles on the subject matter at hand and copyrighted one article on Abortion en-

---

[1] *Amicus curiae* CFL files this brief in accordance with the order of this court dated 5/8 & 5/9/02, by 7/2/02. Counsel for CFL authored this brief in its entirety. No person or entity, other than the CFL, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief. CFL also acts as an advisory panel to the Bishop of Sacramento, but neither speaks for the Bishop nor the Catholic Church and neither contributed to the brief.

[2] James Joseph Lynch is the author of *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy* (1987), and has filed *amicus curiae* briefs in: *Webster v. Reproductive Health Services, 492 U.S. 490 (1989);* Ohio v. Akron Reproductive Ctr., 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bray v. Alexandria*, 113 S.Ct. 753 (1993); *Planned Parenthood v. Williams*, (Calif., No. 5031721, 1994). The views expressed herein are the author's. In *Turnock v. Ragsdale*, 503 U.S. 916 (1992), counsel provided a draft brief for the Attorney General of Illinois which ultimately led to the ACLU's dismissal of the case.

titled.[3]

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws in the State of Illinois, but all of its sister States and territories of the United States. This court's *Amicus* is concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "conceived unborn" and is concerned, and has been concerned for some time, that the conceived unborn, have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood. It is amicus' belief that a conceived unborn is a member of Posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States, that the conceived unborn be recognized as a member of Posterity, entitled to protection.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. The most logical place to look for persons entitled to protection by the Constitution is the Preamble. While the Preamble does not create rights, it does define for whom the rights were created - Ourselves and Our Posterity. This court has recognized aliens and artificial persons as entitled to protection; therefore it is an anomaly not to find that the conceived unborn are also entitled to protection. A construction that Posterity includes the conceived unborn is consistent with the intent of the framers and the common

[3] *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*; Lynch, "*Posterity: A Constitutional Peg for the Unborn*," 40 AJJ 401 (Notre Dame Law School. 1995).

law understanding that a conceived unborn was a person in being, such that a conceived unborn is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, and its progeny, *Roe v. Wade, and its progeny* must be overruled as unsound in principal, unworkable in practice and contrary to the intent of the framers.

3. Because a conceived unborn is a person in the constitutional sense and a petitioners have the common law right to defend the life of a third person about to be taken without justification or excuse, on the record before the court, the court below erred because there is no showing of unreasonable force in light of the willful and wanton taking of human life in the form of a conceived unborn.

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I.

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part; based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal" facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S.

483 (1954) (*Brown II*). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown II*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 294, 298 (1955) (*Brown III*) (Nature of remedy).

This court in *Roe v. Wade*, 410 U.S. 113 (1973) , *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the conceived unborn was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term 'person' as found in the 5th Amendment and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United States. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

II.

THE CONCEIVED UNBORN ARE PERSONS IN THE CONSTITUTIONAL SENSE BY VIRTUE OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

A. The Constitutional and Legal Framework

The most logical place to look for meaning of "personhood" is the Preamble,[4] because, while its purpose is not to create rights,[5] it

---

[4] The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elder of Israel met with Davit at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Cede of Hammurabi were in writing, but were unilateral

does define for whom the rights were created.[6] The Preamble reads:

> "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to **ourselves** and our **Posterity**,[7] do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship.[8] In other contexts, the court has held that aliens[9] and artificial persons[10] are persons entitled to Constitutional protection. Not to recognize unborn and partially born children as a person is therefore an anomaly.

The words "people of the United States" and "citizens" are synonymous terms.[11] The Preamble creates two classes of sover-

---

acknowledgments of human rights. The *Magna Carla,* infra, appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[5] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92 U.S (2 Otto), 542, 549. The 13th & 14th Amendments do not overrule Scott, but only remove the limitations found, thus enlarging the class of persons who are citizens.

[6] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92 U.S. (2 Otto), at 549.

[7] This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

[8] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,..." *E.g.. Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); U.S. Const., Art. VI, Treaty Clause; McKechnie, Magna Carta, Art. 41 (Aliens).

[9] E.g. Hampton v. Mow sun Wong, 426 U.S. 88 (1976) ; US. Const., art. VI, Treaty Clause; McKechnie, Magna Carta, Art. 41 (aliens).

[10] See Chicago B. & *Q*. R.R. Co. v. Iowa, 94 U.S. 155 (1877); *E.g., Land v. Dollar,* 330 U.S. 731 (1947) *(Replevin;* Stock taken under color of federal law).

[11] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92

eignty, "ourselves" and "our Posterity.[12] Its purpose appears to be to include "Posterity[13] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity" as to those who are lives in being is synonymous, if not with "citizenship,"[14] surely "personhood." [15] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[16]. In 1644, in a well-known pamphlet, it was argued, "Parliament could no more censure the issue of the mind than it could the issue of the womb."[17] At common law, certain members of future generations, unborn and partially born children,[18] were lives in being for the purposes of the Rule Against Perpetuities.[19] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[20] and it does not ap-

---

U.S. (2 Otto), 542, 549

[12] ABORTION AND INALIENABLE RIGHTS, etc, supra, at footnote 1, pp. 11-12.

[13] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[14] See footnote 9, supra. It is probably more accurate to say unborn, partially born, children are persons who becomes a citizen (§ 1, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[15] See footnotes 4 and 12

[16] ABORTION AND INALIENABLE RIGHTS.

[17] Milton, John, AREOPAGITICA (1644).

[18] Aristotle, *Politics,* VII, *1335b,* 24-26; Aquinas, *Summa Theologiæ,* 1, q. 76, a. *5* and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. 21 Exodus 22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington Dept of Social Svcs for the Blind,* 474 U.S. 481 (1986).

[19] Gray, The Rule Against Perpetuities (4th Ed.); Alamo School Dirt. v.*Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[20] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Art.

pear that tort actions for the injuries were barred.[21] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation,[22] a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration of Independence[23] and the concept of an "indestructible and perpetual union"[24] in the Preamble, whereas if construed as a fee tail,[25] it would be consistent with an intent to create "unalienable rights" and a "perpetual union,"[26] for the protection of future generations, including the conceived unborn.

---

54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[21] *Sink/er v. Kneale,* 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra,* 205 P. 917 (1922); Halsbury's Laws of England (1st Ed, 1911) Infants §*132, 135.

[22] *White v. Hart,* 80 U.S. (13 Wall.) 646, 650 (1872). Other constructions result in a power of alienation inconsistent with unalienability: contingent remainder, Gray, THE RULE AGAINST PERPETUITEES (4th Ed.); *Alamo School District v. Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960); the rule in Shelly's Case, 31 *Corpus Juris Secundum,* Estates § 4.

[23] "We hold these truths to be self-evident, that all men are created equal that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men, deriving their just powers from the consent of the governed. American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

[24] *White v. Hart,* 80 U.S. (13 Wall.) 646 (1872) construing the preamble.

[25] *Hertz v. Abrahams,* 110 Ga. 707, 36 S.E. 409 (1900); *Haward v. Howe,* 12 Gray (Mass.) 49 *(1858); Gannon v. Albright,* 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates,* 37 Pa 31(1860); *Larew v. Larew,* 146 Va. 134, 135 S.E. 819 (1926). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. ")

[26] 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf, Barber v. Pittsburgh, F. W. & C.RL Co.,* 166 U.S. 83 (1897); *Anderson v. United Realty Co.,* 79 Ohio St. 23, 86 N.E. 644, aff'd 222 U.S. 16 (1911), (recognizing by *dictum* common law rule).

The Constitution was submitted to the People for ratification.[27] Implicit in the Preamble is the concept that the Constitution is to be a social contract[28] wherein society promises the individual unalienable rights, in return for which the individual promises to conform to the laws of society, which do not derogate[29] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[30] As persons under the age of capacity[31] could not consent,[32] it appears the framer's intended that adults were of the class "ourselves," and all others of the class "Posterity,"[33] to include lives in being, *i.e.* unborn and partially born children.

Taking the approach those unborn and partial born children are present members of "Posterity" answer a number of theoretical problems. *Casey,* 505 U.S. at 860. (O'Connor, 1.) First, it is further development of constitutional theory recognizing there is not just one right, or more precisely life, at stake, but two, the mother's, a member of "ourselves," and her conceived unborn, a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her conceived unborn is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives. Fourth, it assures a woman's right to seek medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts,

---

27 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, *65;* 3 Rotunda, op cit., p. 663, note I.

28 E.g., Hobbes, Leviathan (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE-HUMAN RIGHTS READER (1979).

29 Verdross, *Forbidden Treaties In International Law,* 31 AJIL 571 (1937) *Id, Jus Dispositivum & Jus Cogens In International Law,* 60 AJIL 55 (1966).

30 Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) §77; *Coggs v. Berherd,* 2 Ed.Raym. 909 (1703).

31 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." 26th Amend, § 2.

32 Chitty on Contracts.

33 2 Stephens Commentaries 342 (1841).

and those responsible for the medical care of both mother and the conceived unborn out of the quagmire of trying to guess when the unborn become "viable" and therefore entitled to protection. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

B. A Conceived unborn is Life Within The Meaning of the 5th Amendment

It would appear that a conceived unborn have all of the characteristics of life:[34] excretion,[35] ingestion,[36] respiration,[37] irritation,[38] and reproduction.[39] A zygote (early conceived unborn) is viable, in contradistinction to the ovum and sperm, which are not.[40] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a conceived unborn securely within the womb will die if there is an abruption of the placenta.[41] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore

---

34 Biology: Observation & Concept by Case & Steirs (1971), p. 110.

35 Id, pp. 122, 141, 143, 149-150.

36 Id, pp. 70, 80.

37 Id, pp. 8, 51, 64, 77.

38 Id, irritation, pp. 267, 329, 330.

39 Id, reproduction, pp. 122, 163-165, 298-299, 327, 329.

40 Id, pp. 324-327.

41 Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93.

made, that Posterity includes all future generations, with the conceived having a presently protect able interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England (1st ed, 1911) Infants §§ 132, 135.

C. The Conceived Unborn are entitled to protection

The Constitution Provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, arguendo, that the conceived unborn is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §§ 132, 135 (1st ed, 1911), to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972); and it *progeny*; *Cruikshank, supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, neither Illinois nor the federal government have a legitimate interest in denying citizens the right to defend and protect the conceived unborn. Their citizens, and the citizen's of every state, have an interest in insuring that there exist safeguards to ensure that abortion does not become a tool for genocide. E.g., International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).[42]

---

42 This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self-defense.

III.

PETITIONERS HAVE A RIGHT TO USE REASONABLE FORCE TO PROTECT HUMAN LIFE; THE RECORD DOES NOT SUPPORT A CLAIM OF UNREASONABLE FORCE BY PETITIONERS

A. The right to defend others, generally

"Ordinarily, -- if not always," says Bishop, "one may do in another's defense whatever the other might in the circumstances do for himself. Bishop, Criminal Law § 877 (9th Ed., 1923). This special privilege appears to have had its roots in the law of property, but in the course of time outgrew the property analogy and came to be regarded as a "mutual and reciprocal defense." 3 Blackstone's Commentaries 3. In recent years, classifications as to who could defend whom have eroded to become a generalized privilege of using force for the defense of others to include even the defense of strangers. Salmond, Torts 375 (11th Ed 1953.) However, the privilege to use force in defense of another is subject to the same general limitations and restrictions as the privilege to use force in self-defense. Hence deadly force may not be used to save another from non-deadly force, and even non-deadly force must not be obviously in excess of what is needed for the purpose. Id, at Comment b; Boyce & Perkins, Criminal Law and Procedure 819-20 (West, 7th ed 1989).[43]

B. First Amendment Right to Speech

Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb-to-womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

43 It is regrettable that anyone one was hurt. No one condones intentional abuse. However, it is inevitable that in defending the defenseless, on occasion someone will get hurt. On the record below, it does not appear that Petitioners set out intentionally to cause physical harm, but rather the result of two sides refusing to give an inch.

"Protection of politically controversial speech is at the court of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, and urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions if fully protected by the First Amendment. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 US. 263 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993), nor does it protect threats (Cites omitted), nor language used to carry out **illegal conduct** (Cites omitted.)" Opinion below, part III.A.

The opinion below describes a few sporadic incidents when some people were hurt as a result of unintended injuries resulting in trying to prevent injury to the conceived unborn. Here, Petitioners used reasonable force in the defense of the conceived unborn. Neither motive nor act amount to a wrongdoing. Their activity was justifiable.

C. THE RICO CLAIM

The opinion below describes a few sporadic incidents when some people were hurt as a result of unintended injuries resulting in trying to prevent injury to the conceived unborn. It is really the pot calling the kettle black. As it has been shown above that the conceived unborn are entitled to protection, neither NOW, nor any of the respondents can show a prosecutable interest to be protected.

D. THE HOBBS ACT.

While extortion may be a crime under the Hobbs Act, 18 U.S.C., § 1951), and various state laws, it still requires an illicit motive and a wrongful act. Here, Petitioners used reasonable force in the defense of the conceived unborn. Neither motive nor act amount to a wrongdoing.

Based on the foregoing considerations, and in light of the record below, Women do not have a fundamental right to abortion, and therefore no rights of Respondent have been violated. On the contrary, the life of a conceived unborn being a constitutional person is entitled to protection, and on the record below, it cannot be said that the conduct of the Petitioners was unreasonable but the result of accidents that inevitable occur when there is a confronta-

tion.

CONCLUSION

Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: July 1, 2002

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.
Attorney at Law (Cal. SBN 85805)
2740 Howe Ave.
Sacramento, CA 95812-0336
(916) 921-1988
jjlynch@cwnet.com

Counsel for *Amicus Curiæ*

EXCERPTS FROM
2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

---

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's that faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

TUESDAY AUGUST 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

[196]

Tuesday MADISON August 7

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up ...

******

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MADISON August 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee

of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

THURSDAY SEPTEMBER 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd 9; noes --- 1.] Ayes ---

*****

To strike out the word "to" before establish justice 8; bites --- 2,] Ayes ---

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

MONDAY SEPTEMBER 17, 1787.

DETAIL OF AYES AND NOES

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

MONDAY SEPR. 17. 1787. IN CONVENTION

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

MONDAY SEPR. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

(13) (10)

Nos. 01-1118, 01-1119

Supreme Court U.S.
FILED
JUN 12 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC., *Petitioners*,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL., *Respondents*.

OPERATION RESCUE, *Petitioner*,

v.

NATIONAL ORGANIZATION FOR WOMEN, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Theresa Schrempp*
SONKIN & SCHREMPP, PLLC
2955 80th Avenue SE, Suite 201
Mercer Island, Washington 98040-2960
(206) 275-2878

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, Washington 98104
(206) 903-1800

Attorneys for *Amicus curiae*
*Counsel of Record

(This Page Intentionally Left Blank)

QUESTION PRESENTED

The *amicus curiae* will address the following question:

Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" — and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951 (b) (2) (emphasis added)) — criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS 1

INTEREST OF THE *AMICUS* 1

STATEMENT 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAINS" PROPERTY 4

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property. 4

B. Common Law Extortion Required that the Defendant "Get" Property 5

C. The Legislative History of the Hobbs Act Dictates that the "Getting" of Property is a Necessary Element for Extortion 6

D. The Lower Court Erred in Expanding the Hobbs Act to Non-Acquisitive Political Protest 9

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT 12

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE HOBBS ACT TO NON-ACQUISITIVE CRIMES RENDERS IT IDENTICAL TO THE CRIME OF

COERCION, WHICH IS NOT A PREDICATE ACT UNDER RICO 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Carey v. Brown, 447 U.S. 455 (1980) 12

Evans v. United States, 504 U. S. 255 (1992) 6

Feminist Women's Health Center v. Codispoti, 63 F.3d 863 (9th Cir. 1995) 2, 13, 17, 18

Feminist Women's Health Center v. Roberts, W. D. Wa. 86-161-Z; Docket No. 576 ..... 2, 10, 13, 17

Ianelli v. United States, 420 U. S. 770 (1975) 17

Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) 10

McNally v. United States, 483 U. S. 350 (1987) 11

NAACP v. Button, 371 U. S. 415 (1963) 17

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) . .12, 15, 16, 17

New York Times v. Sullivan, 376 U. S. 264 (1964) 18

New York v. Balkan, 656 F. Supp. 536 (E.D. N.Y. 1987) 20

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U. S. 901 (1989) 2, 3, 9, 10

Noto v. United States, 367 U. S. 290 (1960) 17

Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971) .13

People v. Ryan, 232 N.Y. 234, 133 N.E. 572 (1921) 7, 8

People v. Squillante, 18 Misc. 2d 561, 185 N. Y. S.2d 357 (1959) 8

Russello v. United States, 464 U. S. 16 (1983) 4

Scales v. United States, 367 U. S. 203 (1961) 12

United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) 9

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) *cert. denied*, 531 U. S. 811 (2000) 10, 14

United States v. Chestnut, 394 F. Supp. 581 (S.D.N.Y. 1975) 5

United States v. Enmons, 410 U.S. 396 (1973) 9

United States v. Green, 350 U. S. 415 (1956) 8

United States v. Jackson, 180 F.3d 55 (2d Cir. 1999) 10

United States v. Nedley 255 F.2d 350 (3d Cir. 1958) 10

United States v. Sweeney, 262 F.2d 272 (3d Cir. 1959) 10

United States v. Wiltberger, 5 Wheat. 76 (1820) 5

United States. v. Dotterweich, 320 U. S. 277 (1943) 5

Statutes

11 Hen. 7, ch. 23 (1494) 6

18 U.S.C. § 1951 ..... 2, 3

18 U.S.C. § 1951 (b) (2) 4

18 U.S.C. § 1962 2

2 & 3 Edw. 6, ch. 6 (1548) 6

2 Jac., ch 5 (1604) 6

21 Hen. 77, ch. 6 (1529) 6

23 Hen. 8, ch. 9 (1531) 6

27 Eliz. ch. 6 (1585) 6

31 Eliz. ch. 6 § 2 (1589) 6

33 Hen. 8, ch. 39 (1541) 6

4 & 5 Phil. & M., ch. 3 (1557) 6

Model Penal Code and Commentaries §223.4 cmt. 1, at 203 19

New York Penal Law § 552 (1881) 6

Section 584 (Larceny), the Field Code Commissioners 7

Other Authorities

116 Cong. Rec. 854 at 18,941 (1970) 20

89 Cong. Rec. 3227 (1943) 6

91 Cong. Rec. 11,906 (1945) 6

Deuteronomy 30:19.....15

S. Rep. No. 91-617 at 121-122 (1969) 20

S. Rep. No. 91-617, at 215 (1969).....20

Hearings on S. 30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475 (1969).....20

Treatises

BLACK'S LAW DICTIONARY 1078 (6th ed. 1990) 4

Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805, 834 (1990).....18

Note, *Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691 (1999).....5, 11

OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2d ed. 1989) 5

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS*

Concerned Women for America ("CWA") has over 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA supports traditional values, encourages policies that strengthen families, and advocates virtues that are central to America's cultural health and welfare.

CWA is actively engaged in education and the development of public policies that are consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, association, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

The issues at stake in this case are of direct concern to *amicus* and its members. The Seventh Circuit's decision demonstrates that civil RICO, combined with a dangerously expansive definition of Hobbs Act extortion, permits—indeed, requires—courts to mete out Draconian punishment for minor offenses occurring within the

---

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, their members and their counsel made a monetary contribution to the preparation and submission of this brief. Counsel for all parties have consented to the filing of all *amicus* briefs.

context of political protest, thereby chilling protected speech. RICO thus becomes a crushing political weapon in the hands of those who would strive to stifle the voices of others with whom they disagree.

STATEMENT

Petitioners are individuals and organizations that oppose abortion. Respondents are organizations that promote and/or perform abortions. Respondents allege that the Petitioners violated the Racketeering Influenced Corrupt Organizations Act ("RICO") 18 U.S.C. § 1962, when they engaged in the predicate acts of extortion under the Hobbs Act, 18 U.S.C. § 1951.

Hobbs Act extortion is well defined, requiring the extortionist to *obtain* property. Notwithstanding the clear requirement that a defendant "obtain" property from a victim, the lower court instructed the jury that the *obtaining* element is met if a plaintiff has "give[n] up" any "property right"—"whether or not the extortion provided an economic benefit to [defendants]." Tr. 4987. In recent years, similar instructions regarding extortion have been given in RICO cases involving political protest. *Feminist Women's Health Center*, W. D. Wa. C86-161-Z;[2] *Northeast*

[2] The Roberts/Codispoti jury was instructed that extortion involved activity "causing the plaintiffs to part with property or some valuable right." *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576; *Feminist Women's Health Center v. Codispoti*, 63 F.3d 863 (9th Cir. 1995), Excerpt of Record 240-41.

Women's Center, Inc. v. McMonagle, 868 F.2d 1342, (3d Cir.), *cert. denied* 493 U.S. 901 (1989).[3]

This judicial expansion of Hobbs Act extortion is not merely a technical change. In shifting from a requirement that a defendant "get" property from the victim to the lesser requirement that a victim merely give up property; the court radically expanded traditional requirements for extortion. The expanded definition of extortion transforms the Hobbs Act from a statute that was enacted to penalize crimes of acquisition to a statute, which criminalizes political protest.

SUMMARY OF ARGUMENT

The trial court awarded judgment based on a definition of Hobbs Act extortion that is contrary to the plain wording of 18 U.S.C. § 1951. The application of the Hobbs Act to non-acquisitive activities is inconsistent with basic principles of statutory construction, including the plain meaning rule, the common law meaning rule, and the principle of lenity.

In the First Amendment area, the court has a duty to construe a statute to avoid constitutional difficulties. The Seventh Circuit's opinion wholly disregards the requirement that a Hobbs Act defendant "obtain" property in order to commit the crime of extortion. The Seventh Circuit's re-writing of the Hobbs Act

[3] The District Court in *McMonagle* similarly charged the jury with "to part with" language. No. 88-2317 Pet. For Cert., *McMonagle v. Northeast Women's Center, Inc.*, App. at 88.

poses a serious threat to the First Amendment rights of free speech, association, and assembly.

ARGUMENT

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAINS" PROPERTY

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the Court must look at the elements of the traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property.

18 U.S.C. § 1951 (b) (2) defines extortion as "obtaining" of property from another.[4] That words are to be given their ordinary meaning is the fundamental rule of statutory interpretation. *Russello v. United States*, 464 U.S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[5] and "to come

---

[4] Section 1951 (b) (2) provides:

The term "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (emphasis added).

[5] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6th ed. 1990).

into possession or enjoyment of (something) by one's own effort, or by request[.]"[6] Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *United States. v. Dotterweich*, 320 U.S. 277, 286 (1943) ("Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably' within the confines of the statutes." (citations omitted). *See, also, United States v. Wiltberger,* 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, the Court must strictly construe all language, resolving any ambiguity in favor of lenity. *United States v. Chestnut,* 394 F. Supp. 581, 591 (S.D.N.Y. 1975) (holding that the narrow construction of criminal statute meets "least drastic means" test).

B. Common Law Extortion Required that the Defendant "Get" Property.

At common law, extortion was an offense committed by a public official who took money "by colour of his office." Common law required both a giving up of property by the victim and a "getting" of property by the perpetrator to complete the crime of extortion. Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms,* 75 Notre Dame L. Rev. 691, 705-706 (1999). This Court has made it

---

[6] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; ...hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2d ed. 1989).

clear that "extortion" in 18 U.S.C. § 1951 was a common-law term, which should be interpreted by reference to common law. *Evans v. United States*, 504 U.S. 255 (1992).

Though Congress expanded the common-law definition of extortion to include acts by *private* individuals under limited circumstances, the requirement that the extortionist "receive" property has been a necessary element of the crime throughout history.[7] Congress has not expanded the "obtaining" element of extortion. Therefore, the traditional common law element of "getting" or "receiving" property controls the interpretation of the Hobbs Act "obtaining" element.

C. The Legislative History of the Hobbs Act Dictates that the "Getting" of Property is a Necessary Element for Extortion.

Congress, in enacting the Hobbs Act and in defining "extortion," took the relevant language from the New York Penal Law.[8] Accordingly, in interpreting the Hobbs Act, this Court

---

[7] 11 Hen. 7, ch. 23 (1494) ("**receive**. . .by Color or their Office"); 33 Hen. 8, ch. 39 (1541) ("**receive** or take") ("**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548) ("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557) ("exact, levy, **receive or take**") 21 Hen. 77, ch. 6 (1529) ("take, **receive** or demand"); 23 Hen. 8, ch. 9 (1531) ("ask, demand, take or **receive**"); 27 Eliz. ch. 6 (1585) ("**receive**, take or have"); 31 Eliz. ch. 6 § 2 (1589) ("have, **receive** or take"); 2 Jac., ch 5 (1604) ("take, **receive** or make benefit to his own use") (emphasis added)

[8] 89 Cong. Rec. 3227 (1943) (Statement of Hobbs) ("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also* 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Penal Law § 552 (1881) defined extortion as: "Extortion is the obtaining of property from

should give controlling weight to the New York Penal Law and those cases construing it at the time the Hobbs Act was passed.

Under New York law, as under the common law, the question of whether extortion occurred turned on whether the defendant intended to receive or procure money or property. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.
>
> New York Field Code, Ch. 4 § 584 (1865) (emphasis added).

Courts in New York consistently held that extortion required a "getting" of property or money to the extortionist, not merely a deprivation to the victim. In *People v. Ryan*, 232 N.Y. 234, 133 N.E. 572, 573 (1921), a prosecution for blackmail (one element of which was "the intent … to extort or gain any money or other property"), the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall

---

another, with his consent, induced by wrongful use of force or fear, or under color of official right."

within the statute.[9] *See also People v. Squillante,* 18 Misc. 2d 561, 564, 185 N. Y. S.2d 357, 361 (1959) (holding in an extortion case that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something"). No New York case interpreting the extortion statute at the time the Hobbs Act was passed ever suggested that the "obtain" element of extortion could be met without a "getting" of property by the extortionist.

Congress adopted the Hobbs Act in 1946. During the four decades following the enactment of the Hobbs Act, this nation has experienced intense, divisive, and passionate political protest, involving most notably the struggle for civil rights for black Americans and protests against United States involvement in Viet Nam. Despite the fact that the targets of these protests were often private businesses (for example, segregated lunch counters and manufacturers of napalm), not a single reported case suggests that the federal extortion statute could be applied to political protest.[10]

---

[9] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan*, 133 N. E. 572, 573 (1921).

[10] In *United States v. Green*, 350 U.S. 415 (1956), the Supreme Court held that Hobbs Act extortion applied to instances in which the perpetrator deprived his victim of property for the benefit of a related third party, rather than for himself. Even under this slightly expanded application, however, extortion remained a crime of acquisition.

This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs Act. *United States v. Enmons,* 410 U.S. 396 (1973). The Court held that the defendants in *Enmons* did not violate the Hobbs Act, because they neither intended nor acted to *wrongfully* enrich themselves or others, when they sought higher wages for work actually performed.

D. The Lower Court Erred in Expanding the Hobbs Act to Non-Acquisitive Political Protest.

The first time any court interpreted the Hobbs Act as requiring only a deprivation to the victim and not a corresponding gain to the perpetrator (or related third party) was in *Northeast Women's Center, Inc. v. McMonagle,* 868 F.2d 1342 (3d Cir. 1989), *cert. denied,* 493 U.S. 901 (1989).[11] The plaintiffs in *McMonagle* sued abortion protestors under RICO, alleging predicate acts of extortion. The Third Circuit, without addressing the definition of "obtaining" and with no analysis of the meaning and history of the "obtaining" requirement, held that Hobbs Act extortion, and thus RICO, applied to circumstances in which neither the perpetrator, nor a related third party "got" the property of which the victim was deprived.

---

[11] Arguably, *United States v. Anderson,* 716 F.2d 446 (7th Cir. 1983) expanded extortion to non-acquisitive crimes, but the opinion contains little discussion of facts or analysis of law.

Other courts quickly seized on the holding in *McMonagle* in adopting this radical departure from the traditional definition of extortion. *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576 (reversed on *res judicata* grounds, 63 F.3d 863 (9th Cir. 1995)). *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999) *cert. denied,* 531 U.S. 811 (2000); *Libertad v. Welch,* 53 F.3d 428 (1st Cir. 1995).

Each of these cases involved abortion protestors. One may entertain little doubt that the intent of this litigation was to chill the free speech rights of the pro-life movement. The fact that each court so readily adopted an expanded definition of the "obtaining" element of extortion in these cases against political protest by abortion opponents could hardly be a coincidence.[12]

---

[12] For example, in *McMonagle,* the Third *Circuit* ignored controlling precedent in its own circuit in order to apply the Hobbs Act and RICO to anti-abortion protestors. In *United States v. Nedley* 255 F.2d 350 (3d Cir. 1958) and in *United States v. Sweeney*, 262 F.2d 272 (3d Cir. 1959) the court of appeals had held that extortion was a larceny-type offense requiring a taking. Yet, the Court in *McMonagle* did not distinguish or overrule its holdings in *Nedley* or *Sweeney*. Shortly after the Second Circuit decided *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999) *cert. denied,* 531 U.S. 811 (2000) in which the court upheld application of the Hobbs Act to abortion protestors, the same court decided *United States v. Jackson,* 180 F.3d 55 (2d Cir. 1999). In the latter case, which involved a scheme to reveal an alleged relationship between celebrity Bill Cosby and his alleged daughter, the Court narrowly applied the Hobbs Act, after analyzing the common law and New York Law, and determined that the Hobbs Act did not apply unless the defendant's attempt to "obtain" something was "wrongful." One critic has noted that the only readily apparent distinction between *Arena* and *Jackson* is that one involved a celebrity while the other involved anti-abortion protestors. Note, *Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms,* 75 Notre Dame L. Rev. 691, 738 (1999).

The desire to crush the free speech rights of one's political opponents is an overwhelming one, and one which can be adequately checked only by a judiciary committed to the protection of free speech rights of those of all political persuasions.

Congress intended to limit the application of the Hobbs Act to those who wrongfully gain property from another. This Court has strictly discerned and enforced that intent. The petitioners' actions do not fit within the parameters of the Hobbs Act. They were not business competitors of the respondents. They did not attempt to "get" the respondents' abortion business, nor did they intend that the respondents' abortion business be directed to a related third party. On the contrary, the protestors desired that the respondents (and all other abortion providers) cease performing abortions. Neither the protestors, nor related third parties stood to gain an economic benefit by their actions of engaging in sit-ins and demonstrations.[13]

The petitioners likewise did not attempt to "get" either tangible or intangible property from any woman interested in having an abortion. An "intangible right" is not the same as "intangible property." *McNally v. United States*, 483 U.S. 350, 352 (1987) (holding that the intangible right of honest government is not a

---

[13] In fact, it is unclear what "extortionate acts" the jury found in the instant case. *See, Appendix G* to No. 01-1118 Pet. for Cert.

property right protected by the mail fraud statute). The fact that abortion is legal does not convert this intangible "right" into "property"—let alone property that is susceptible to being "obtained" by an extortionist.

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT

"Public-issue picketing" and political speech occupy the very highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown,* 447 U.S. 455, 467 (1980). Boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association are often coercive and intimidating. These forms of protected speech may result in economic loss to others. Those characteristics do not remove the activities from First Amendment protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982).

In instances in which illegal activity occurs within the context of political protest, imposition of punishment by a court must be judged "'according to the strictest law'" in order to avoid infringement of First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) *quoting Scales v. United States,* 367 U.S. 203, 299-300 (1961).

In the instant case, the trial court not only declined to apply the "strictest law" doctrine in instructing the jury; it expanded the

definition of extortion in a manner that would practically assure that free speech rights would be violated.

The Seventh Circuit dispensed with the requirement that a defendant "obtain" property in an extortion (or the attendant RICO) case. Without requiring the obtaining of property, *any* illegal activity, however minor or non-violent, is extortionate, *because* it occurs in the context of political protest.[14] The Seventh Circuit's formulation of the Hobbs Act can be summarized as follows: Even minor, non-violent, wrongful activity (unprotected by the First Amendment, but often present in concerted political protest) in the context of political protest (protected, though inherently coercive[15]) equals extortion, because (according to the Seventh Circuit) the plaintiff need not prove that the defendant obtained anything.

---

[14] The RICO statute can and has been used against abortion protestors who engage in "classic" acts of civil disobedience. In *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z, the plaintiffs alleged that Hobbs Act extortion occurred when defendant Sharon Codispoti and one other person sat on the steps of a building occupied by several businesses including an abortion clinic. No violence, force, injury, or threat of injury was claimed. Plaintiffs also claimed "extortion" because the anti-abortion picketers parked in the public spaces in front of the clinic. *Feminist Women's Health Center v. Roberts, supra,* Docket No. 402. On appeal, the Ninth Circuit correctly noted that parking in a public place "was not unlawful." *Feminist Women's Health Center v. Codispoti*, 63 F.3d 863, 865 (9th Cir., 1995).

[15] *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-420 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment").

Shockingly, under this faulty definition of the Hobbs Act (and the resulting expansion of RICO's application) political protesters who engage in an otherwise minor illegality will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct for non-political reasons, or for no reason.[16] Defendants who engage in generic disorder for non-political reasons will be dealt with, if at all, under state criminal laws and civil penalties for trespass, nuisance, malicious mischief, or similar claims. Defendants who engage in identical acts in the context of attempting to persuade a business or an individual to change its course of conduct are subject to crushing criminal and civil liability under RICO. Such defendants are bludgeoned civilly by their political opponents, as in this case, or charged with a major felony in federal court, as in *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999). The lower court's defective definition of extortion thus catapults a minor act of civil disobedience to a major felony.

Such an expansion of the Hobbs Act (and thus the RICO statute) if left in place, will have a profoundly chilling impact on all manner of political protest and on all acts of civil disobedience. It is not easy for a political protestor to see the line between

---

[16] The Hobbs Act does not even require that the underlying act be one that is otherwise a criminal offense. The Hobbs Act requires only that a defendant engage in "wrongful" use of force, violence or fear in order to obtain property.

protected and unprotected protest activity. Take, for example, the following comment:

> None of us better not be caught up here. I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met.[17]

Is that protected speech or the "wrongful" use of "threatened force"? Is the exhortation to "choose life"[18] protected speech or will it be construed as a "threat" of "violence"? Tr. 5187. Does a sit-in demonstration on the front steps of an office building owned by a tobacco company constitute "use of . . .fear" to "obtain" property?

People who choose to participate in political protest do so because of passionately held beliefs. The beliefs of their opponents are often equally passionate. The use of RICO as a hammer against one's political opponents is nearly irresistible, as is the tendency of the "victims" to create or exaggerate the facts in order to conform to the law. Does anyone doubt that, had RICO been an available political weapon during the 1950's, white business owners would have brought a private racketeering claim against those who engaged in technically illegal sit-ins at segregated lunch counters and other businesses? Is there any doubt that an Alabama jury would have found that the actions of

---

[17] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 888, 938 (1982) (speech of Charles Evers).

[18] Deuteronomy 30:19.

Dr. King and others in engaging in sit-ins on private property constituted "use of ... fear" against business owners and white customers, resulting in losses to the targeted businesses? Does anyone doubt that the targeted business owners would have, intentionally or otherwise, exaggerated their observations and reactions to the illegal protest in order to detonate the ultimate nuclear bomb of litigation—a RICO lawsuit which offers the opportunity to brand one's political opponents "racketeers" as well as to extract treble damages from them?

Consider the holding of the Mississippi court reviewed by this Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 895 (1982), that "many" black citizens were "overcome out of sheer fear" to "withhold their trade" from the complaining businesses. The targeted businesses sustained economic losses. Under the expanded definition of "extortion" formulated by the trial court and the Seventh Circuit, would not the participants in the *Claiborne Hardware* boycott today be subject to RICO under an extortion theory?

This threat to civil liberties is exacerbated by the fact that political speech often occurs in concert with others as in the instant case. Under the expanded definition of the Hobbs Act, a prosecutor (or civil RICO plaintiff) can assert extortion or RICO under vicarious liability theories of conspiracy and aiding and abetting, if *any* member of the group engages in *any* illegal

activity. Because a court may infer conspiracy from the facts,[19] a wholly innocent member of a loosely affiliated group of protestors will likely find it impossible to secure a dismissal short of trial, if at all.[20]

No one suggests that a protestor who engages in wrongdoing should not be liable for his or her own criminal conduct.[21] The real question is: Should a political protestor's punishment be *enhanced* because the criminal activity occurred within the scope of a confrontational political protest? Such an enhancement of punishment is antithetical to the fundamental constitutional principle that holds that illegal activity, in the context of political speech, must be subjected to the "strictest law." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) (citing *Noto v. United States*, 367 U.S. 290, 299 (1960).

The looming specter of a RICO liability will surely cast fear into the hearts of all citizens who choose to publicly and

---

[19] *Ianelli v. United States*, 420 U.S. 770, 777 n. 10 (1975).

[20] For example, in *Feminist Women's Health Center v. Roberts*, W. D. Wa. C86-161-Z, 18 defendants were initially named. After a number of parties were dismissed by the court or by the plaintiffs, six parties proceeded to trial. Judgment was entered against three defendants. *Feminist Women's Health Center v. Roberts*, W. D. C86-161Z, Docket # 691, 693. The Ninth Circuit reversed the judgment. *Feminist Women's Health Center v. Codispoti*, 63 F.3d 863 (9th Cir. 1995).

[21] Punishment for criminal conduct within the scope of political protest is, of course, subject to the "precision of regulation" standards demanded by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1981), (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

vigorously demonstrate their message. Where the protesters' political opponents are both powerful and well financed, as they are in this case, the threat of a ruinous racketeering lawsuit will chill — or freeze — the free speech rights guaranteed by the Constitution. RICO cases are notoriously costly, frustratingly complex, and seemingly endless. One writer has noted that:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit....[C]ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat.
>
> Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990).

In the context of political speech, many protestors will be unwilling to risk the nightmare of a RICO lawsuit,[22] and will be intimidated into limiting their speech to the blandest form, to avoid crossing over a vaguely defined line of "wrongful" activity. All of which is contrary to the "[P]rofound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan,* 376 U.S. 264, 270 (1964).

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE HOBBS ACT TO NON-ACQUISITIVE CRIMES

---

[22] The instant case is now in its fifteenth year of litigation. The defendants in *Feminist Women's Health Center* v. *Codispoti,* 63 F.3d 863, 865, (9th Cir. 1995), endured nearly a decade of litigation. That case was filed in 1986, went to trial in 1989, and was reversed by the Ninth Circuit in 1995. The judgment was reversed because the *same defendants had been sued once before* (in state court in 1983) which resulted in the finding of *res judicata.*

RENDERS IT IDENTICAL TO THE CRIME OF COERCION, WHICH IS NOT A PREDICATE ACT UNDER RICO

Extortion was a crime of acquisition at common law. "Coercion" is a statutory crime with a much broader application. The Model Penal Code distinguishes "extortion" from "coercion" as follows:

> [T]he major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.
>
> Model Penal Code and Commentaries §223.4 cmt. 1, at 203.

The Seventh Circuit's faulty application of the Hobbs Act to non-acquisitive, albeit "wrongful" activity renders the elements for extortion identical to the elements of coercion.[23] Notably, the crime of coercion was not included as one of the "predicate offenses" supporting a RICO claim. This omission cannot be presumed accidental. During the debate on the RICO bill, several Senators,[24] the Department of Justice,[25] and the ACLU[26] expressed

concerns that the language in the earlier version of the bill, which defined racketeering activity as "danger of violence to life, limb or property" was overbroad and would permit suppression of anti-war protest. In response, the original language was replaced with a list of specific federal and state offenses. The crime of "coercion" was not included in the list of predicate offenses, nor was any crime related to trespass or vandalism. The measure passed, with RICO's chief sponsor, John L. McClellan stating that RICO, as revised "offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce, while posing no real threat to civil liberties."[27]

The Seventh Circuit's decision converts actions that are merely coercive into actions that constitute extortion. The judicial re-

---

[23] In *New York v. Balkan*, 656 F. Supp. 536 (E.D. N.Y. 1987), the court rejected the notion that "extortion" under the Hobbs Act means the same thing as "coercion" under the New York Penal Law. This holding is particularly significant because Hobbs Act extortion derived from New York law.

[24] *See* S. Rep. No. 91-617, at 215 (1969) ("[T]he reach of this bill goes beyond organized criminal activity.") (individual views of Sen. Philip A. Hart and Sen. Edward M. Kennedy).

[25] S. Rep. No. 91-617 at 121-122 (1969).

[26] "[O]ffenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill. . ." Statement of Lawrence Speiser, director of the Washington office of the ACLU. Measures Relating to Organized Crime: Hearings on S. 30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475 (1969).

[27] 116 Cong. Rec. 854 at 18,941 (1970).

writing of the Hobbs Act and thus the RICO statute pose the very threat to civil liberties that Congress scrupulously attempted to avoid.

CONCLUSION

The Court should reverse the Judgment of the Seventh Circuit.

Respectfully submitted,

Theresa Schrempp
SONKIN & SCHREMPP, PLLC
Eightieth Avenue Professional Building
2955 80th Avenue SE, Suite 201
Mercer Island, Washington 98040-2960
(206) 275-2878

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, Washington 98104
(206) 903-1800

July 12, 2002

(14) (11)

Nos. 01-1118 and 01-1119

Supreme Court, U.S.
FILED
JUL 12 2002
CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-ACTION LIFE LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL*,

Respondents.

On Writs of Certiori To The United States Court of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONERS

MICHAEL E. ROSMAN
Counsel of Record
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
Washington, DC 20036
(202) 833-8400

36pgs

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Seventh Circuit's Holding Diverts Federal Criminal Law From Its Proper Purpose And Infringes On State Domain 2

A. The Original Role of Federal Criminal Law 2

B. The Expansion of Federal Criminal Law 4

C. Federal Duplication of State Criminal Law 8

D. The Effect of the Lower Court's Holding 10

II. The Seventh Circuit's Holding Effects A Change In The Federal-State Balance Without A Clear Statement By Congress 13

A. Statutes Should Be Read To Avoid Altering The Federal-State Balance 14

B. Statutes Should Be Read to Avoid Constitutional Problems 16

C. Federal Criminal Statutes Should Always Be Read Narrowly 18

III. The Decision Of The Lower Court Interferes With The Policy Decisions Made In The Freedom Of Access To Clinic Entrances Act 19

IV. The Interpretation Of The Court Below Creates Unnecessary First Amendment Problems 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Brooks v. United States, 267 U.S. 432 (1925) 6

Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988) 22

Dowling v. United States, 473 U.S. 207 (1984) 18

Hill v. Colorado, 530 U.S. 703 (2000) 12

Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997) 21

Jones v. United States, 529 U.S. 848 (2000) 10, 16-18, 22

LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261 (S.D.N.Y. 1991) 24

Metropolitan R.R. Co. v. Moore, 121 U.S. 558 (1887) 19

Miller v. California, 413 U.S. 15 (1973) 12

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 12

National Organization of Women v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 22

New York v. United States, 505 U.S. 144 (1992) 4

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 20

Perez v. United States, 402 U.S. 146 (1971) 8, 22

Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 2002 U.S. App. LEXIS 9314 (9th Cir. May 21, 2002) (en banc) 23

Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1006 (9th Cir. 2001) 23

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 12

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995) 1

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 16, 17

The Barnes Foundation v. The Township of Lower Merion, 242 F.3d 151 (3d Cir. 2001) 24

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 16

United States v. Bass, 404 U.S. 336 (1971) 14, 18

United States v. Bird, 124 F.3d 667 (5th Cir. 1997) . 21

United States v. Culbert, 435 U.S. 371 (1978) 7

United States v. Gluzman, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998) 9

United States v. Harris, 106 U.S. 629 (1882) 5

United States v. Lanier, 520 U.S. 259 (1997) 13

United States v. Local 560 of International Brotherhood of Teamsters, 780 F.2d 267 (3rd Cir. 1985) 11

United States v. Local 807 of International Brotherhood of Teamsters, 315 U.S. 521 (1942) 15

United States v. Lopez, 514 U.S. 549 (1995) . 14, 16, 18

United States v. Morrison, 529 U.S. 598 (2000) 1, 17, 18

United States v. Price, 383 U.S. 787 (1966) 13

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978) 11

United States v. Scott, 788 F. Supp. 1555 (D. Kan. 1992) 23, 24

White v. Lee, 227 F.3d 1214 (9th Cir. 2000) 24

Constitutional Provisions, Statutes, Rules:

18 U.S.C. § 241 13

18 U.S.C. § 242 13

18 U.S.C. § 248 . . . . . 1, 20-23, 25

18 U.S.C. § 248(a) 20

18 U.S.C. § 248(a)(1) 23

18 U.S.C. § 248(b) 20

18 U.S.C. § 248(c)(1)(A) 20

18 U.S.C. § 248(d)(1) 23

18 U.S.C. § 248(d)(2) 23

18 U.S.C. § 248(d)(3) 21

18 U.S.C. § 844(i) 9, 17

18 U.S.C. § 1951 . . . 1, 2, 7, 10-15, 18, 19, 21, 22, 25

18 U.S.C. § 2261(a)(1) 9

18 U.S.C. §§ 1961 *et seq.* 13, 20, 21

33 U.S.C. § 1344(a) 16

42 U.S.C. § 1983 13

42 U.S.C. § 3617 . . . . . 23, 24

91 Cong. Rec. 11899-900 (1945) 15, 19

Anti-Drug Abuse Act of 1986 8

Anti-Drug Abuse Act of 1988 8

Civil Rights Act of 1871 5

Comprehensive Drug Abuse Prevention and Control Act (Controlled Substances Act) of 1970 8

Consumer Credit Protection Act 8

Crime Control Act of 1984 8

Crimes Act of 1790 3

Dyer Act 6

Federal Anti-Racketeering Act of 1934 . . . . . 7, 15

Fugitive Felon Act 6

Lindbergh Act 6

Mann Act 6

N.Y. Penal Law § 530 (1909) 19

N.Y. Penal Law § 851 (1909) 19

National Stolen Property Act 6

Omnibus Crime Control and Safe Streets Act of 1968 8

Organized Crime Control Act of 1970 8

Post Office Act of 1872 5

Sup. Ct. Rule 37.2(a) 1

Sup. Ct. Rule 37.6 1

U.S. Const. amend. I 1, 2, 22, 25

U.S. Const. amend. XXI 7

U.S. Const. art. I, § 8 3

U.S. Const. art. I, § 9 3

U.S. Const. art. I, § 10 3

Violent Crime Control and Law Enforcement Act of 1994 8

Other Authorities:

American Bar Association, Criminal Justice Section Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* (1998) 4, 8

Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213 (1984) 7

Chamberlain, *Federal Criminal Statutes*, 20 A.B.A. J. 501 (1934) 7

G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young: *Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345 (1996) 19

John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 Rutgers L.J. 495 (1985) 5

Kathleen F. Brickey, *Criminal Mischief: The Federalization of Criminal Law*, 46 Hastings L.J. 1135 (1995) 3, 7

Lawrence M. Friedman, *Crime and Punishment in American History* (1994) 5

N. Abrams, *Federal Criminal Law And Its Enforcement* (1986) 7

Nat Hentoff, *HUD's Attack On The First Amendment*. Wash. Post, Sept. 17, 1994 at A-15 24

Note, *Legislation*, 21 Va. L. Rev. 568 (1935) 7

Stephan E. Oestreicher, Jr., *Scheidler Meets Morrison (At the Entrance to a Health Clinic)*, 35 Creighton L. Rev. 693 (2002) 15

The Federalist No. 17 (Alexander Hamilton) (New York 1788) (Legal Classics ed. 1983) 4

The Federalist No. 51 (James Madison) (New York 1788) (Legal Classics ed. 1983) 4

William Brand, *Speech Spells Trouble*, Oakland Tribune, July 21, 1994 at A-9 24

INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to federalism and the First Amendment, including *United States v. Morrison*, 529 U.S. 598 (2000) and *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

CIR believes that the court below gave insufficient weight to federalism and free speech concerns in interpreting the Hobbs Act. This brief provides some historical perspective on the expansion of federal criminal law and examines the decision of the Seventh Circuit in light of those important federalism concerns, and in light of free speech concerns.[1]

SUMMARY OF ARGUMENT

The Seventh Circuit concluded that the petitioners here "obtained" the "property" of women seeking abortion services by preventing them from obtaining those services. In doing so, it followed its own circuit authority, which significantly expanded the scope of the Hobbs Act so that it covers far more activity traditionally covered by state criminal law. Indeed, as we show below, that interpretation creates concerns with the constitutionality of the Hobbs Act altogether. The interpretation also appears to render Congress's passage of the Freedom of Access to Clinic Entrances Act largely unnecessary.

---

1 Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The interpretation of the Seventh Circuit reads the "obtaining" of "property" as if it said "interference" with a "right." Laws that prohibit "interference" with a "right" are not unknown, but because "interference" is such a broad term, they are often difficult to interpret and/or are interpreted in a manner that creates First Amendment problems. Of course, such problems must be dealt with where Congress has passed a statute using words like "interference" and "rights." But it seems inappropriate to create such problems where Congress has used much simpler (and narrower) terminology.

ARGUMENT

I. The Seventh Circuit's Holding Diverts Federal Criminal Law From Its Proper Purpose And Infringes On State Domain.

Under our Constitution, the intended and proper purpose of federal criminal law is to supplement the criminal law of the states by protecting federal interests. The protection of citizens is the task of the states. Over the course of roughly the last century, however, federal criminal law has moved away from its role as a supplement to state law and in the direction of a substitute police power. The Seventh Circuit continues this trend by holding that unlawful interference with abortion can be punished as extortion under the Hobbs Act, 18 U.S.C. § 1951. Such a holding effectively displaces state choices concerning the protections to be given to intangible rights.

A. The Original Role of Federal Criminal Law

Prior to the addition of the Bill of Rights, the Constitution made scant mention of federal criminal law. It

vested Congress with the power to punish the counterfeiting of currency and securities of the United States, piracies and felonies committed on the high seas, and crimes violating the law of nations. U.S. Const. art. I, § 8. It enjoined both Congress and the states from passing bills of attainder or ex post facto laws, and provided for trial by jury in federal prosecutions and extradition of fugitives from justice. *Id.* art. I, §§ 9, 10. Beyond these specifics, however, the proper role and scope of federal criminal jurisdiction was unknown. The Constitution did not directly confer power to exercise criminal jurisdiction, and controversy surrounded the question of whether federal courts had jurisdiction over common-law crimes. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of Criminal Law*, 46 Hastings L.J. 1135, 1137 n.15 (1995). Accordingly, Congress's first forays into the realm of criminal law were marked by extreme caution.

The early federal criminal laws were only concerned with activity of special federal interest, such as conduct that injured or interfered with the federal government or its programs, or conduct occurring in areas of exclusive federal jurisdiction. The Crimes Act of 1790, for example, punished forgery of United States certificates, perjury in federal court, treason, acts of violence against ambassadors, as well as ordinary crimes committed within a fort, federal territory, or the District of Columbia. *Id.* at 1138. Through the mid-nineteenth century, what few federal property crimes there were concerned theft or destruction of federal property, such as revenue fraud, theft from a federal bank, or arson on a federal vessel. *Id.* at 1138-39. In general, where no specific federal interest could be identified, federal law did not reach crimes against individuals. Laws for the general protection of the citizenry fell squarely within the police power of the states. Consequently, for years following the

adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. American Bar Association, Criminal Justice Section Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* 5 (1998) [hereinafter *ABA Report*].

Such an arrangement was consistent with the vision of the Framers. Writing to assuage antifederalist fears of strong national government, Alexander Hamilton stated that "the ordinary administration of criminal and civil justice" would be the "one transcendent advantage belonging to the province of the state governments" under the Constitution. *The Federalist* No. 17 (Alexander Hamilton) 104 (New York 1788) (Legal Classics ed. 1983). The fact that the states would be "the immediate and visible guardians of life and property" would render them "at all times a complete counterpoise . . . to the power of the union." *Id.* James Madison took Hamilton's analysis one step further. The ultimate beneficiaries of having the administration of criminal justice remain solely in state hands were not the states, but the people, since a "double security" to their rights would develop under a system in which neither sovereign encroached on the sphere of the other. *The Federalist*, *supra*, No. 51 (James Madison) at 119-20. *See also New York v. United States*, 505 U.S. 144, 154 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

B. The Expansion of Federal Criminal Law

Congress's first attempts to regulate criminal activity that did not directly involve federal interests were motivated by concerns about state enforcement. The post-Civil War civil rights acts, for example, established criminal sanctions for infringements of the rights they created because the

courts of some states could not be counted on to extend the protection of the laws to everyone. Even with that base, some laws were found unconstitutional. *E.g.*, *United States v. Harris*, 106 U.S. 629 (1882) (holding that Congress had no general power to punish a private citizen for an invasion of the rights of another and declaring criminal provisions of Section 2 of the Civil Rights Act of 1871 unconstitutional). However, more typical of the federal government's early efforts at the direct protection of private citizens were circumstances in which federal law could supplement state law by focusing on a particular federal interest. The Post Office Act of 1872, for example, forbade mailing lottery tickets or obscene matter, or using the mails to defraud. John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 Rutgers L.J. 495, 514 (1985). Though the effects of mail fraud and pornography were felt at the local rather than federal level, Congress was specifically empowered to regulate the postal system itself. Despite the fact that it protected citizens and not federal interests, the Post Office Act at least focused on a specific federal area of expertise.

An analogous development occurred in the area of interstate commerce as increased mobility brought new threats to state economies. In 1884, for instance, Congress forbade railroads and boat lines from accepting or transporting diseased livestock. Lawrence M. Friedman, *Crime and Punishment in American History* 116 (1994). Though Iowa tried to combat the spread of infectious disease with laws against driving diseased cattle into its territory, it could not criminalize the loading of the same cattle onto trains bound for Iowa when the loading took place in Texas. Thus, though the health of Iowa's livestock was hardly a federal interest, Congress's authority over interstate commerce allowed for a federal solution of greater breadth than any

given state itself could create.

Congress's focus, however, eventually began to shift from laws that would supplement state commercial regulations to ordinary local crimes. The Mann Act, for example, was an attempt to curb local prostitution by prohibiting the transportation of a woman across state lines for illicit purposes. Likewise the Dyer Act prohibited the interstate transportation of a stolen motor vehicle. Chief Justice Taft stated the rationale for such measures when he stated, "Elaborately organized conspiracies for the theft of automobiles and the spiriting of them away . . . have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny." *Brooks v. United States*, 267 U.S. 432, 438 (1925).

The Chief Justice's sentiments reflected the development of two trends that pushed the federal government away from its auxiliary role in the criminal law and in the direction of a substitute police power. First, the idea that Congress had been "roused" by automobile theft indicates that local crime had become a matter for national attention, which in turn meant an increased reliance on federalization as the solution to local problems. Second, as calls for increased federalization grew stronger, the crimes Congress chose to bring within the federal ambit became ever more tenuously linked to interstate *commerce*. After the Dyer and Mann Acts came the National Stolen Property Act (prohibiting transportation of stolen property across state lines), the Lindbergh Act (prohibiting the interstate transportation of kidnappees), and the Fugitive Felon Act (prohibiting interstate flight to avoid prosecution). Brickey, *supra*, at 1143-44.

Despite the demise of Prohibition and accompanying

disengagement of the federal government from one aspect of law enforcement, the federalization trend only accelerated from the New Deal onward. Indeed, the passage of the Twenty-First Amendment (repealing prohibition) led to a flurry of criminal legislation. *See generally* Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 228-35 (1984); Chamberlain, *Federal Criminal Statutes*, 20 A.B.A. J. 501, 501-03 (1934). One such statute was The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569 (1934), which included language carried forward in the Hobbs Act. *See United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The 1934 Act bears the distinction of being the "earliest explicit extension of federal criminal enforcement power based upon the effect upon commerce rationale." N. Abrams, *Federal Criminal Law And Its Enforcement* 38 (1986); *see also* Bradley, *supra*, 22 Am. Crim. L. Rev. at 233 (earlier legislation "required * * * either interstate travel or use of a facility of interstate commerce."). Indeed, the 1934 Act seemed designed to push the frontiers of Congressional authority to reach local crime. *See* Note, *Legislation*, 21 Va. L. Rev. 568, 569 n.7 (1935) (Congress "sens[ed] the tenuous nature of its power in this field [of racketeering]" and "provided for the punishment of persons whose acts 'in any way or in any degree' affect interstate commerce"); *id.* at 572 n.20 (similar language covering "acts in any degree affecting interstate commerce" in Trade Interference Act "is probably of little value. The effect of the acts prohibited must be more than incidental").

As Congress passed more laws based upon the "effects" of crime on interstate commerce, it relied on the more expansive interpretations of that branch of the commerce power that this Court provided. Thus, in *Perez v. United States*, 402 U.S. 146 (1971), this Court upheld the application of relevant criminal provisions of the Consumer

Credit Protection Act to the run-of-the-mill threatening collection practices of a loan shark. There was no tie to interstate commerce from the specific loan; it was sufficient for this Court that Congress had found that extortionate credit transactions generally are carried on to a substantial extent in interstate or foreign commerce.

With the advent of the omnibus crime bill, Congress utilized the "affecting commerce" theory and increased the rate at which it created new federal offenses exponentially. In the 1960's and 1970's, concerns about organized crime, drugs, street violence, and other social ills precipitated a particularly significant rise in federal criminal legislation dealing with local activity, including the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, and the Comprehensive Drug Abuse Prevention and Control Act (Controlled Substances Act) of 1970. As concerns about crime grew more acute in the 1980's and 1990's, Congress enacted the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, and the Violent Crime Control and Law Enforcement Act of 1994. In sum, more than forty percent of the federal criminal provisions enacted since the Civil War have been enacted in roughly the last thirty years. ABA Report, *supra* at 7. As of 1998, federal crimes were so great in number and so diffusely scattered throughout the United States Code that no readily accessible list of them existed. *Id.* at 9.

C. Federal Duplication of State Criminal Law

The explosion of Congressional activity concerning local crime has resulted in a situation in which federal criminal law now duplicates and supplants the law of the states. As an example, the Violence Against Women Act, which prohibits "travel across a state line . . . with the intent

to injure, harass, or intimidate [one's] spouse or intimate partner" (18 U.S.C. § 2261(a)(1)) has been used in place of state homicide laws to punish murders. *E.g.*, *United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998). Though the law invokes federal jurisdiction as soon as a state border is crossed, the limitations of human foresight make the law inapplicable until after harm has been done. In practice, therefore, the law fails to reach any activity not already within the purview of the states, and merely replicates state laws against violent crime. Such a situation arises out of the fact that the interstate travel element of the statute bears no logical relationship to the harm it seeks to prevent, and is merely used to create a "hook" to the Constitution. The essence of the proscribed conduct is the violent act itself, not the interstate movement.

Federal duplication of state criminal law is even more pronounced in the field of property crimes. Unlike the Violence Against Women Act, which nominally criminalizes only the act of interstate travel, the federal arson statute, 18 U.S.C. § 844(i), punishes arson itself, so long as the building affected is used in commerce. Consequently, except in areas of exclusive federal jurisdiction, § 844(i) cannot apply to any circumstance not already covered by state arson laws.

While redundant protections in theory need not be harmful, a criminal law uniformly applicable throughout the United States threatens to undo policy decisions made by state and local authorities. Often, federal and state prohibitions on the same activity carry substantially different sentences. *Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) ("The fact that petitioner received a sentence of 35 years in prison when the maximum penalty

for the comparable state offense was only 10 years illustrates how a criminal law like this may effectively displace a policy choice made by the State.") (internal citations omitted). Moreover, a general federal police power may result in federal prohibitions on activities that states and localities have consciously chosen *not* to outlaw, or even to protect. More fundamentally, it creates an overlap in authority that diminishes the protections to individuals that our system of divided sovereignty was intended to provide.

D. The Effect of the Lower Court's Holding

The Hobbs Act, 18 U.S.C. § 1951, reads as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Ostensibly a prohibition on the obstruction of interstate commerce, the Hobbs Act effectively duplicates state

law against robbery and extortion. What is unique to the Hobbs Act, however, is that the expansion of federal criminal jurisdiction it enables is as much the work of the federal courts as Congress. By reading the "obtains property" provision broadly, appellate courts have brought an expansive range of activity previously regulated by state prohibitions on *coercion* (with much lesser penalties) within the definition of *extortion*. While the paradigmatic extortion scheme is a demand for money coupled with a violent threat, courts have extended the extortion prohibition of the Hobbs Act to intangible interests that more closely resemble civil liberties than property. The Fourth Circuit, for example, has held that "the right . . . to make a business decision free from outside pressure," is a form of property subject to Hobbs Act extortion. *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978). Likewise, the Third Circuit has held that the Hobbs Act protects the "right to democratic participation" in a labor union. *United States v. Local 560 of International Brotherhood of Teamsters*, 780 F.2d 267, 282 (3rd Cir. 1985). Holdings such as these have effectively created the federal crime of "coercion affecting interstate commerce," and thus run afoul of the fundamental rule that there is no federal common law of crimes.

The Seventh Circuit's holding in this case continues this trend. By interpreting "extortion" to include unlawful interference with the right to abortion, the court brings criminal activity previously regulated by the states into the federal sphere. In doing so, it displaces policy decisions made by the states concerning the punishment of those who interfere with intangible rights like the right to an abortion. Such a result exemplifies the problems of federal encroachment through criminal legislation. Where intangible rights are concerned, including the right to protest others' exercise of their rights, even to the point of breaching the peace, the

degree and type of protection given to one right from private interference has a profound effect on the exercise of others. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982). Accordingly, the state interest is particularly strong where private interference with intangible rights are concerned, and the ordering of those rights has always been a state prerogative. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 (1980) (upholding state interest in promoting more expansive free speech rights than conferred by the federal Constitution at the expense of property rights); *Miller v. California*, 413 U.S. 15, 30-34 (1973) (holding local norms regarding obscenity relevant to the limits of protected speech); *Hill v. Colorado*, 530 U.S. 703, 727 (2000) (deferring to state balancing of free speech and privacy interests). By holding that wrongful interference with another's right can be punished as extortion under the Hobbs Act, the Seventh Circuit has withdrawn punitive discretion from the states, and thereby undone state choices concerning the balance between rights.

The breadth of the Seventh Circuit's interpretation of the Hobbs Act can be illustrated by a few examples. All cases of *quid pro quo* sexual harassment would be Hobbs Act violations where (1) the perpetrators lead the victims to believe that they would lose their jobs or suffer some other economic harm if they failed to submit[2] and (2) some article in commerce is affected. Common law business torts of unfair competition frequently would be Hobbs Act violations if the victims had been induced to refrain from entering into transactions by others' suggestions that they will attempt to impose economic harm if the victims enter into the transac-

---

[2] The court instructed the jury that the "fear" element of extortion under the Hobbs Act could be met by fear of economic harm. Scheidler Pet. App. 151a (quoting Tr. 4946).

tion. If a speaker in the public square is intimidated from speaking because of the menacing shouts of members in the audience, those audience members, too, will have violated the Hobbs Act under the Seventh Circuit's expansive definition.

Since the Hobbs Act also prohibits "official extortion," requiring no element of fear, violence, or threat, the Seventh Circuit's definition of "obtaining property" would also be relevant for that crime. Presumably, *any* act under color of state law that violates Section 1983 would be included so long as an article or commodity in commerce has been affected. Thus, the Hobbs Act could then serve as an alternative prosecutorial tool to Sections 241 and 242 of the criminal code, each of which require a "specific intent" to violate a particular federal right and "fair warning" of the federal right in question. *United States v. Price*, 383 U.S. 787, 806 n.20 (1966); *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). As predicate acts under RICO, 18 U.S.C. §§ 1961 *et seq.*, the Hobbs Act violations could serve as an alternative to Section 1983, in which treble damages could be recovered. So, too, RICO could serve as a separate basis for suing federal officials who engage in misconduct, rendering the *Bivens* action altogether outdated for any pattern of misconduct.

II. The Seventh Circuit's Holding Effects A Change In The Federal-State Balance Without A Clear Statement By Congress.

In bringing interference with the right to abortion within the parameters of the Hobbs Act, the Seventh Circuit ignored three of this Court's rules of statutory interpretation, those of preserving the federal-state balance, avoiding constitutional questions, and construing criminal statutes

narrowly (*i.e.*, with lenity). Because protection of economic and political intangible rights, particularly from private interference, fall within the state sphere, extending the reach of the Hobbs Act to include them requires a clear signal that Congress intended the law to reach them.

A. *Statutes Should Be Read To Avoid Altering The Federal-State Balance*

As discussed above, over the last two centuries federal law has evolved from a few modest statutes protecting uniquely federal interests to a parallel system of criminal protections that applies not only where state law is inadequate, but in many circumstances where it is perfectly adequate. Nonetheless, as this Court recently and repeatedly has recognized, under our federal system the primary responsibility for defining and enforcing the criminal law still falls upon the states. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). Accordingly, expansions of federal criminal provisions that do not directly protect federal interests necessarily alter the delicate balance between state and federal regulatory authority. To protect this balance, this Court has stated that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" unless Congress makes clear an intent to do so. *United States v. Bass*, 404 U.S. 336, 349 (1971). In other words, where a "broad construction . . . renders traditionally local criminal conduct a matter for federal enforcement," a narrow construction is preferred. *Id.* at 350.

Congress passed the Hobbs Act in response to this Court's decision in *United States v. Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942), which to some legislators seemed to "legalize in certain labor

disputes the use of robbery and extortion." 91 Cong. Rec. 11899-900 (1945) (statement of Rep. Hancock). The defendants in *Local 807* were convicted of having extorted payment in violation of the Hobbs Act's predecessor, the Anti-Racketeering Act of 1934. The 1934 Act, however, contained an exception for actors seeking "the payment of wages by a bona-fide employer to a bona-fide employee," which this Court properly interpreted as excluding labor organizers. As this Court stated, "[T]he elimination of terroristic activities by professional gangsters was the aim of the statute, and . . . no interference with traditional labor union activities was intended." 315 U.S. at 530. By removing the "bona-fide employer" provision but otherwise mimicking the language of the 1934 Act, Congress, in enacting the Hobbs Act, sought to eliminate the organized labor exemption of the older statute but preserve its substance.

The broad reading of "obtaining" and "property" adopted by the Court of Appeals in this case has thus resulted in the application to petitioners of a statute intended for "professional gangsters" engaging in "terroristic activities." Such a reading would be suspect even if it did not result in the federalization of activity traditionally regulated by the states. As commentators have observed, however, "all of the [petitioners'] actions are subject to regulation and prosecution at the state level." Stephan E. Oestreicher, Jr., *Scheidler Meets Morrison (At the Entrance to a Health Clinic)*, 35 Creighton L. Rev. 693, 712 (2002). Acts of trespass and disturbing the peace are now within the parameters of the Hobbs Act in the Seventh Circuit. Such a result is inconsistent with this Court's rule of preserving the state-federal balance by construing federal criminal statutes narrowly.

B. Statutes Should Be Read to Avoid Constitutional Problems

The rule discussed in the preceding section is, as this Court has observed, closely related to another rule of statutory interpretation, that of constitutional avoidance: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), quoted in *Jones v. United States*, 529 U.S. 848, 857 (2000).

Recent opinions by this Court have clarified the rule in the context of statutes with a commerce "hook." In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court analyzed regulations promulgated under the Clean Water Act that extended the federal government's authority to all bodies of water large enough to be useful to migratory birds. The "Migratory Bird Rule" was an administrative interpretation; the Clean Water Act itself merely granted regulatory authority over "navigable waters." 33 U.S.C. § 1344(a). This Court held that the Migratory Bird Rule was an excessively broad reading of the authority granted by Congress, in part because Congress's own authority over mere mudflats and ponds was questionable. Under *United States v. Lopez*, 514 U.S. 549 (1995), Congress's authority to regulate activities "affecting commerce" within a sovereign state only reaches commercial activity that overall substantially affects interstate commerce and non-commercial acts with a distinct link to interstate commerce in the specific instance. *Id.* at 561-62. *But see Morrison*, 529 U.S. 598, 612 (2000) (a jurisdictional element "*may*

establish that the enactment is in pursuance of Congress's regulation of interstate commerce" (emphasis added)). While lakes and rivers that supported interstate shipping were within Congress's purview, an interpretation of "navigable waters" that authorized the Migratory Bird Rule would require the Court to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. at 173. Thus, because the Migratory Bird Rule would "invoke the outer limits of Congress's power," and "result in a significant impingement of the States' traditional and primary power over land and water use," a narrower reading of "navigable waters" was necessary. *Id.* at 172-74.

The earlier case of *Jones v. United States*, 529 U.S. 848 (2000) involved the same principle. The petitioner in *Jones* was convicted under the federal arson statute, 18 U.S.C § 844(i), of having thrown a Molotov cocktail into his cousin's residence. Section 844(i) made it a federal crime to destroy any property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The house Jones burned was supposedly connected to interstate commerce in three ways: a mortgage, an insurance policy, and deliveries of natural gas. In overturning Jones's conviction, this Court observed that a reading of "used in interstate or foreign commerce" broad enough to encompass the residence in question would arguably extend the protections of § 844(i) to every building in the United States. *Jones*, 529 U.S. at 857. Because such a reading would create problems under *Lopez*, this Court rejected it. *Id.* at 857-58.

Applied to the Hobbs Act, this rule of construction dictates an outcome contrary to that reached by the Seventh Circuit in this case. Interpreting "obtaining" of "property"

to include any interference with intangible rights expands the parameters of the Hobbs Act to encompass a significant amount of non-economic activity. Although that may not be impermissible if there is a jurisdictional element tying the act in question to interstate commerce in a significant way, the broad reach of the Hobbs Act jurisdictional element is very much like the one this Court had to read narrowly in *Jones* in order to avoid constitutional problems. That is, the broader the reach of the substantive definition of extortion, the more likely it is that this Court will have to read the jurisdictional element narrowly to avoid difficult constitutional issues. On the other hand, a narrow reading of the Hobbs Act that does not include interference with a right within "extortion" avoids some of these difficult constitutional issues under *Lopez* and *Morrison*.

C. *Federal Criminal Statutes Should Always Be Read Narrowly*

A third rule of statutory interpretation at work in *Bass* and *Jones* and relevant to petitioners' claim is that of lenity. Lenity dictates that any ambiguity in the breadth of criminal statutes should be resolved in favor of narrowness, so as not to criminalize more activity than Congress intended. *Dowling v. United States,* 473 U.S. 207, 217-28 (1984) ("Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate."). As this Court recently explained, lenity rests on two underlying principles: 1) citizens should have fair warning of potential criminal liability for their actions; and 2) legislatures, not courts, should define criminal activity. *Bass*, 404 U.S. at 348. Though both principles are relevant to state criminal law, lenity is a particularly important consideration where federal statutes are concerned.

Applied to the case at hand, the rule of lenity compels a narrower interpretation of extortion than the Seventh Circuit's. Holding that interference with another's personal liberty to undergo abortion is equivalent to obtaining property broadens the meaning of extortion to encompass the familiar crime of coercion. "Extortion protects property; coercion protects autonomy." G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young: *Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345, 1600 (1996). The drafters of the Hobbs Act did not intend it to extend to coercion. The language of the Hobbs Act was borrowed from the criminal law of New York, as Representative Hobbs himself acknowledged. 91 Cong. Rec. 11900 (1945) (statement of Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially."). The contemporary criminal law of New York, consistent with the common law, knew coercion and extortion as separate offenses. N.Y. Penal Law §§ 530, 851 (1909). This Court has held that when a legislature borrows the language of a statute from another jurisdiction, the language must be construed the way the other jurisdiction intended. *See Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 572 (1887) ("construed in the sense in which they were understood at the time in that system from which they were taken"). Extortion under the Hobbs Act, therefore, should protect the property interest that New York's extortion law protected, not the autonomy protected by its law of coercion.

III. The Decision Of The Lower Court Interferes With The Policy Decisions Made In The Freedom Of Access To Clinic Entrances Act

In the Freedom of Access to Clinic Entrances Act

("FACE"), Congress protected the provision and receipt of "reproductive health services." It prohibited the use of force or threat of force or physical obstruction to attempt to injure, intimidate or interfere with any one trying to obtain or provide reproductive health services. 18 U.S.C. § 248(a). It provided for criminal penalties for those who violate those prohibitions, including a fine and a maximum sentence of one year for a first-time offender and three years for a repeat offender. 18 U.S.C. § 248(b). Lesser penalties are provided if the violation was a nonviolent one. *Id.* Civil actions may be brought "only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services." 18 U.S.C. § 248(c)(1)(A). Such plaintiffs may choose actual damages or statutory damages in the amount of $ 5,000 per violation. There are provisions for attorneys' fees (including the costs of expert witnesses), but not treble damages. Congress has not made a violation of FACE a predicate act under RICO.

When Congress has set up a very specific scheme for the vindication of a very particular right, this Court should be reluctant to interpret a different statute in a way that would render the detailed scheme meaningless. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) ("Interpreting § 1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims"). Here, the Hobbs Act calls for criminal penalties of up to twenty years; FACE has a maximum penalty of three years. Because the Hobbs Act is a predicate act under RICO, the various restrictions on civil

actions in FACE can also be circumvented where a pattern of such violations can be alleged.[3]

The difference between FACE -- where Congress has specifically and unambiguously altered the balance between federal and state relations -- and the Hobbs Act could not be more stark. So, too, the constitutional issue appears in a much different light. FACE protects only one kind of commercial activity, one which Congress specifically concluded had a substantial effect on interstate commerce. *Hoffman v. Hunt*, 126 F.3d 575, 583 (4th Cir. 1997). Thus, it is perhaps more likely to survive constitutional challenge, even if the activity being regulated may not be economic. *Compare Hoffman v. Hunt*, 126 F.3d at 586-87 (upholding FACE because it regulated conduct "'closely and directly connected with an economic activity' -- the operation of abortion clinics") *with United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997) (although FACE regulated non-economic activity, it was valid because it was "'an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated'").

In contrast, under the Seventh Circuit's interpretation, the Hobbs Act regulates "any robbery or extortion" that "affects" the "movement of any article or commodity in commerce," where "extortion" includes the interference in

---

[3] To be sure, Congress specifically stated that FACE should not be considered an "exclusive" penalty or remedy for the conduct that it prohibited, but its focus appeared to be on not preempting *state* laws that protected the provision of reproductive health services. 18 U.S.C. § 248(d)(3) ("Nothing in this section shall be construed . . . to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies").

one's exercise of a right. Robbery and extortion are not commercial activities (and not closely related to a commercial transaction, as the extortionate collection of loans were for the statute considered in *Perez*); the Seventh Circuit's interpretation makes extortion even less so; and the connection to interstate commerce seems even weaker than the government's proffered connection in *Jones v. United States*. There are good reasons for not extending the Hobbs Act so far by judicial fiat. *See* Part II, *supra*. Those reasons are strengthened where Congress has passed a far more specific statute covering the particular misconduct in question.

IV. The Interpretation Of The Court Below Creates Unnecessary First Amendment Problems

In concluding that the defendants "obtained" the property, the court below asserted that it was following long-standing Seventh Circuit precedent holding that all that was needed to meet the statutory definition was interference with a right. *National Organization of Women v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001) ("A loss to, or interference with the rights of, the victim is all that is required").

Statutes that prohibit "interference" inevitably create some First Amendment problems since one can interfere in all sorts of ways with another's goals, including with speech and petitioning activity. *E.g.*, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988) (declaring the Hunter Harassment Act, which prohibited interference with the lawful taking of wildlife, unconstitutional). For example, the FACE statute discussed in the last section prohibits interference by threat of force with someone else's efforts to obtain or provide reproductive health services. 18 U.S.C. § 248(a)(1). Congress somewhat gratuitously asserted that the statute should not be interpreted to prohibit "expressive conduct . . .

protected from legal prohibition by the First Amendment" (18 U.S.C. § 248(d)(1)) or "to create new remedies for interference with activities protected by the . . . First Amendment" (18 U.S.C. § 248(d)(2)). Nonetheless, the Ninth Circuit has struggled with whether speech that contained no explicit threats nonetheless suggested a threat against abortion doctors in violation of FACE. *Compare Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1006 (9th Cir. 2001) (answering "no") *with Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 2002 U.S. App. LEXIS 9314 (9th Cir. May 21, 2002) (en banc) (answering "yes").

Similarly, the Fair Housing Act states:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act].

42 U.S.C. § 3617. Several courts have interpreted this provision to preclude petitioning government for discriminatory reasons. In *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992), for example, the district court adopted the United States's contention that the filing of a reasonably-based state court action to enforce the terms of a restrictive covenant requiring a home to be a single family dwelling for residential purposes violated Section 3617. The defendants in the federal action had tried to enjoin the purchase of the home by a group devoted to providing services for the disabled, and were concededly motivated by the handicap of

the future occupants. The court concluded that the act of issuing a letter threatening to enforce the restrictive covenant, and the filing of the lawsuit, constituted a violation of Section 3617. *Id.* at 1562.

In *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991), the district court concluded that the efforts of local private citizens to incorporate their neighborhood, which proposition was voted on and passed by 70% of the voters, would violate the Fair Housing Act if done to achieve discriminatory goals. (The complaint alleged that the activity was undertaken to prevent an Orthodox Jewish place of worship in the neighborhood.) *Id.* at 271-72.

Although these authorities are now a minority view,[4] they were the accepted view of the executive branch of the federal government (as *Scott* reflects) for many years. *See, e.g.*, Nat Hentoff, *HUD's Attack On The First Amendment*. Wash. Post, Sept. 17, 1994 at A-15; William Brand, *Speech Spells Trouble*, Oakland Tribune, July 21, 1994 at A-9 (quoting Justice Department spokesman: "If . . . someone goes to a public hearing and makes his or her view known . . . and somehow interferes with the fair housing act, Justice would sue that person"). The difficulty, of course, is that "interference" with a "right" can be construed to include actions taken through the political process to prevent

---

[4] *White v. Lee*, 227 F.3d 1214, 1230 (9th Cir. 2000) ("In theory, § 3617 could be interpreted even more broadly, so that a wide range of speech regarding the housing rights of others could be investigated and sanctioned. One person's persuasive editorial on a zoning dispute, for instance, might well 'interfere' with another person's ability to secure housing. So construed, however, § 3617 would quickly run afoul of the First Amendment principles . . . "); *The Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151, 160-62 (3d Cir. 2001) (noting trend of authority).

housing from being built.

To be sure, when dealing with statutes like FACE and the Fair Housing Act, the problem must be addressed, and the conflict with First Amendment values must be resolved, because those statutes specifically prohibit "interference" (and Section 3617 of the Fair Housing Act prohibits interference with "rights"). But the Hobbs Act does not. It prohibits *obtaining* the *property* of another. By interpreting it to mean "interference" with "rights," the court below invited a whole series of free speech problems that easily can be avoided simply by interpreting the statute in a fashion more consistent with its actual terms. For this reason as well, the Seventh Circuit's broad reinterpretation of the statute should be rejected.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

Michael E. Rosman
Counsel of Record
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
Washington, DC 20036
(202) 833-8400

Supreme Court U.S.
FILED
JUL 11 2002
OFFICE OF THE CLERK

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners.

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner.

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Garry J. Rhoden, Esquire
Florida Bar No. 139955
GRAY HARRIS
Post Office Box 3324
Tampa, Florida 33601-3324
(813) 273-5000-Phone

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
Joel L. Oster
Kansas Bar No. 18547
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone

30p3

QUESTIONS PRESENTED

Amicus curiae will address the following question as presented in Petition for a Writ of Certiorari Nos. 01-1118 and 01-1119:

1. Whether the "obtaining of property" element of the federal extortion statute, which is a predicate offense for civil RICO, may be satisfied, as the Seventh Circuit held, merely by a showing of "interference with the rights" of another?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I.

The Crime of Extortion As Used In the Hobbs Act Requires the Extortionist to Obtain Property from the Victim 3

II.

The Predicate Act of Extortion for Rico Liability must Require the Extortionist to Obtain Property as Opposed to Merely Causing Loss to or Interfering with the Rights of the Victim 7

Conclusion 22

TABLE OF AUTHORITIES

Cases **Page(s)**

Evans v. United States,
504 U.S. 255 (1992) 5, 8, 20

In re Baldwin-United Corp.,
770 F.2d 328 (2d Cir. 1985) 20

Jacques Ferber, Inc. v. Bateman,
No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) .. 20

Libertad v. Welch,
53 F.3d 428 (1st Cir. 1995) 12

Morissette v. United States,
342 U.S. 246 (1952) 6

Northeast Women's Ctr., Inc. v. McMonagle,
868 F.2d 1342 (3d Cir. 1989) 7, 9, 17, 18, 19

NOW v. Scheidler,
267 F.3d 687 (7th Cir. 2001) ..... 7, *passim*

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 20

Palmetto v. Operation Life Line,
117 F.3d 142 (4th Cir. 1997) 19

People v. Squillante,
185 N.Y.S.2d 357 (App. Div. 1959) 6

Printers II, Inc. v. Professionals Publishing, Inc.,
615 F. Supp. 767, (S.D.N.Y. 1985) 6

United States v. Arena,
180 F.3d 380 (2d Cir. 1999) 15, 19

United States v. Carlock,
806 F.2d 535 (5th Cir. 1986) 13

United States v. Frazier,
560 F.2d 884(8th Cir. 1977) 10, 13

United States v. Green,
350 U.S. 415 (1956) 6, 11, 15, 16

United States v. Hairston,
46 F.3d 361 (4th Cir. 1995) 13

United States v. Hyde,
448 F.2d 815 (5th Cir. 1971) 14

United States v. Jackson,
180 F.3d 380 (2d Cir 1999) 4, 15

United States v. Jacobs,
451 F.2d 530 (5th Cir. 1971) 13

United States v. Lance,
536 F.2d 1065 (7th Cir. 1986) 13

United States v. Lewis,
797 F.2d 358 (7th Cir. 1986) 9, 12, 13

United States v. Nedley,
255 F.2d 350 (3d Cir. 1958) 6, 10, 14, 18

United States v. Panaro,
266 F.3d 939 (9th Cir. 2001) 10, 13

United States v. Provenzano,
334 F.2d 678 (3d Cir.1964) 9, 14, 16

United States v. Santoni,
585 F.2d 667 (4th Cir. 1978) 13

United States v. Stillo,
57 F.3d 553 (7th Cir. 1995) 9, 12

United States v. Sweeney,
262 F.2d 272 (3d Cir. 1959) 18

Williamson v. Lee Optical Co.,
348 U.S. 483 (1955) 20

Willis v. E. Trust & Banking Co.,
169 U.S. 295 (1897) 6

Constitutional Provisions:

U.S. CONST. AMEND. V & XIV 20

Statutes and Legislative Material:

18 U.S.C. § 420(a)-(e) (1934) 4

18 U.S.C. §§ 1861-68 7

18 U.S.C. § 1951 (2000) 4, 7

42 U.S.C. § 1983 20

N.Y. Penal § 850 (Consol. 1930) 4

S. Rep. No. 73-532 (1934) 4

91 Cong. Rec. 11900 (1945) 4

Other Authorities:

American Heritage Dictionary of the English Language (2000) 8

Amicus Brief of State of Alabama 20

Blacks Law Dictionary 972 (5th Ed. 1979) 8

G. Robert Blakely and Kevin Roddy, *Reflections on Reeves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Under RICO*,
33 AM. CRIM. L. REV. 1349 (1996) 8

Felix Frankfurter, *Some Reflections on the Reading of Statutes*,
47 COLUM. L. REV. 527 (1947) 5

James Lindgren, *The Elusive Distinction Between Bribery and Extortion from the Common Law to the Hobbs Act*,
35 UCLA L. Rev. 815 (1988) 8

Model Penal Code and Commentaries (1980) 7

Note, *Protestors, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*,
75 NOTRE DAME L. Rev. 691 (Dec. 1999) . 4, 15, 18

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization which provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending these rights throughout the nation.

Liberty Counsel defends the right of pro-life demonstrators such as the petitioners in this case, and is concerned about the Seventh Circuit's treatment of the questions presented in this case. Allowing the Seventh Circuit's opinion to stand will cause grave harm to the Free Speech and Free Exercise rights of individuals similarly situated to the petitioners in this case.

Liberty Counsel defends the right of all people to participate in constitutionally protected protest. If the Seventh Circuit's decision is affirmed, such protest activities will be chilled by an inordinate threat of civil RICO litigation arising from the Seventh Circuit's overly broad interpretation of the scope and purpose of the Hobbs Act.

---

[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Crime of extortion as used in the Hobbs Act requires the extortionist to obtain property from the victim. The predicate act of extortion for RICO liability must therefore require the extortionist to obtain property as opposed to merely causing loss to or interfering with the rights of the victim. By requiring an alleged extortionist to "obtain" property in order to violate the Hobbs Act, this Court will bring the Hobbs Act within its intended reach under common law and New York law history, and at the same time salvage the right to free speech.

ARGUMENT

I.

THE CRIME OF EXTORTION AS USED IN THE HOBBS ACT REQUIRES THE EXTORTIONIST TO OBTAIN PROPERTY FROM THE VICTIM.

The term "extortion" as used in the Hobbs Act requires the extortionist to "obtain" property from the victim. To be liable, the extortionist must do more than merely cause loss to, or interfere with the rights of the victim.

Passed in 1946, the Hobbs Act reads, in relevant part:

> (a) Whoever obstructs, delays, or affects commerce . . . by extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty (20) years, or both.[2]

The Hobbs Act then defines "extortion" as follows:

> The term "extortion" means the obtaining of property from another, with his consent,

---

[2] *See* 18 U.S.C. §1951(a).

induced by wrongful use of actual or threatened force, violence, or fear, under color or official right.[3]

This definition of extortion was drawn from the predecessor to the current Racketeering Corruption Organization Act (hereafter "RICO" the Anti-Racketeering Act of 1934 ("1934 Act").[4] The 1934 Act was largely modeled after the extortion definition contained under then existing New York law.[5] The Hobbs Act sponsor, Representative Hobbs, acknowledged the connection between the 1934 Act and then existing New York law in 1945 during debates preceding the passage of the Hobbs Act.[6] As such, the language used to define extortion is

---

[3] *See* 18 U.S.C. §1951(b)(2).

[4] *See* 18 U.S.C. §§ 420(a)-(e) (1934).

[5] The Senate Judiciary Committee intended the 1934 Act to be aimed at persons who committed extortion. See S. Rep. No. 73-532, at 1 (1934).

[6] The language used to define extortion in the Hobbs Act is the same language that was used under then existing New York law. *See United States v. Jackson,* 180 F.3d 55, 69 (2d Cir. 1999); 91 CONG.REC. 11900 (1945) (Statement of Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially."); N.Y. PENAL LAW §850 (Consol. 1930) ("Extortion is the obtaining of property from another ... with his consent, induced by wrongful use of force or fear, or under color of official right."); Note, *Protestors, Extortion and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 707 (Dec. 1999).

largely the same under both the Hobbs Act and then existing New York law, i.e., the extortionist must "obtain" "property" from the victim.[7]

When Congress uses a term of art such as "extortion," it is presumed to retain its common law meaning. This Court should construe the Hobbs Act in accordance with its common law meaning.[8] Similarly, when Congress borrows statutory language from another jurisdiction, courts should construe that statute in conformity with the jurisprudence from the jurisdiction in which it was borrowed.[9] Other courts have also

---

[7] In *Evans v. United States*, 504 U.S. 255 (1990), this court interpreted the public misconduct portion of the Hobbs Act in conformity with its common law definition. Since there was nothing in the statutory text or legislative history to the contrary, this court construed that portion of the Hobbs Act in conformity with the common law definition. *Id.* at 264. Similarly, there is nothing in the statutory text or legislative history that provides the judiciary with a conclusion other than that Congress intended for "obtaining" under Hobbs Act extortion to mirror the common law definition which required that an extortionist "get" property.

[8] As Justice Felix Frankfurter advised, "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

[9] *See Evans v. United States,* 504 U.S. 255, 259-60 (1992) (stating that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from

acknowledged that the Hobbs Act had its origin in the laws of New York and in the common law crime of extortion.[10]

Both the common law and New York law definitions of extortion required that the extortioner "obtain" or "get" property.[11] This Court should interpret "extortion" to require the extortionist to "obtain" or "get" property from the victim. Anything less ignores the history of the term as used in the Hobbs Act. This Court has at least once impliedly used the terms "obtain" and "get" interchangeably.[12]

---

which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.") When a legislature borrows statutory language from another jurisprudence, that language should be construed in accord with the other jurisdiction's jurisprudence. *See also Willis v. E. Trust & Banking Co.*, 169 U.S. 295 (1897); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

[10] *See United States v. Nedley*, 255 F.2d 350 (1958).

[11] *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767 (S.D.N.Y. 1985) (reasoning that extortion requires a taking of property); *People v. Squillante*, 185 N.Y.S.2d 357 (App. Div. 1959) (reasoning that extortion implies that the person obtaining must actually receive property).

[12] *See also United States v. Green*, 350 U.S. 415, 419 (1956) (arguably using the term "obtain" and "get" interchangeably).

II.

THE PREDICATE ACT OF EXTORTION FOR RICO LIABILITY MUST REQUIRE THE EXTORTIONIST TO OBTAIN PROPERTY AS OPPOSED TO MERELY CAUSE LOSS TO OR INTERFERENCE WITH THE RIGHTS OF THE VICTIM.

The Seventh Circuit in *NOW v. Scheidler*,[13] severely weakened the First Amendment and significantly expanded RICO liability by eliminating the requirement that a defendant "obtain" property from the victim in order to commit the crime of extortion under the Hobbs Act.[14]

To reach its conclusion, the *Scheidler* court confused "coercion" with "extortion".[15] The Hobbs Act is rooted in

---

[13] *See* 267 F.2d 687 (7th Cir. 2001).

[14] The Hobbs Act is one of several predicate acts to 18 U.S.C. §§1861-68, or RICO. The Hobbs Act prohibits "extortion." The Hobbs Act defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *See* 18 U.S.C. § 1951 (b)(2).

[15] Coercion was not a common law offense, but rather a creature of statute. The Model Penal Code ("MPC") defines "coercion" as the use of threats with the purpose of "unlawfully restricting another's freedom of action to his detriment." MODEL PENAL CODE AND COMMENTARIES §212.5 cmt. 2, at 264 (1980). In contrast, "extortion" is contained in the MPC's consolidated

the common law.[16] At common law, a victim had to lose something of tangible economic value, and the extortionist had to "take" from the victim.[17]

---

offense of "theft" and is restricted to the criminal who "obtains property of another by" threats. *Id.* § 223.4 cmt. 1, at 203. *See also* G. Robert Blakey & Kevin Roddy, *Reflections on Reeves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1660 (1996) ("[O]btaining of property distinguishes extortion from coercion as coercion involves the restriction of another's freedom of action by threat.").

[16] Federal extortion law is rooted in the common law. *See Evans v. United States*, 504 U.S. 255 (1992) (citing James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988)). This Court's jurisprudence provides that a statutory term is presumed to maintain its common law meaning. *Id.* at 260.

[17] Amici will not address the interpretation of "property" that includes both "tangible" and "intangible" within its ambit. At common law, an extortionist took either money or some valuable thing. Whether or not it was proper for the courts to interpret intangible property within this definition is debatable. One view, however, is that including intangible property withing the definition of "property" was reasonable and necessary because of the changing nature of wealth in modern society. The recent construction of the term "obtain" by some courts is not reasonable, however, for while the meaning of "property" has an ever changing definition, the meaning of "obtain" has a definite meaning in the English language. These reasons arguably explain why Congress did not define its meaning in the Hobbs Act. "Obtain" means "to acquire," "to procure," or "to get hold of." *See* BLACK'S LAW DICTIONARY 972 (5TH ed. 1979); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000).

Notwithstanding the common law meaning of "extortion", some courts, beginning with *United States v. Provenzano*,[18] through *Northeast Women's Center v. McMonagle*,[19] to the Seventh Circuit's decision in *Scheidler*, have eroded both the common law definition and Congressional intent by eliminating the requirement that the extortioner "obtain" or "get" property. The Seventh Circuit merely required a showing that the defendant cause a loss to or interfere with the rights of the alleged victim. Such a showing is not "extortion."

Misunderstanding of Hobbs Act extortion is in part traced to the application of cases involving the inchoate criminal offenses of attempted extortion and conspiracy to commit extortion, which the Hobbs Act also prohibits, to cases involving allegations of the completed crime of extortion.

The Seventh Circuit in *Scheidler* misunderstood the significance of the inchoate offenses proscribed by the Hobbs Act as evidenced by its reliance on those cases for its holding.[20] A defendant charged with attempted extortion or

---

[18] 334 F.2d 678 (3d Cir. 1964).

[19] 889 F.2d 466 (3d Cir. 1989).

[20] *See Scheidler*, 267 F.3d at 709 (*citing Stillo*, 57 F.3d at 559). *See also United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) (stating, in dicta, that "[l]oss to the victim is the gravamen of the offense," where defendant *attempted* to extort money by ordering victim to deposit one million dollars into a third party's account); *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995) (involving defendants that were indicted for, among other crimes, *conspiracy* to commit

conspiracy to commit extortion has not actually "obtained" or "acquired" anything. The defendant's argument that he or she has not "taken" or "gotten" "property" under the Hobbs Act is irrelevant. These crimes are by their very nature inchoate. Thus, relying on a decision that arose in the context of an inchoate offense, and applying that dicta to a case where a defendant is charged with an actual, completed crime, in the end creates a straw man.

Some of the misunderstanding has also arisen when courts apply dicta from prior decisions out of context.[21] The Seventh Circuit and appellate courts applying its reasoning, have shown a propensity to apply dicta from prior decisions

---

extortion); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant *attempted* to extort $150,000 from a bank by having that money deposited into a third party's account).

[21] *See Scheidler*, 267 F.3d at 51 ("[A]s a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.") *See contra United States v. Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) ("[U]nder the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived . . .."); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958) (finding evidence insufficient to convict defendant under the Hobbs Act based on allegations that the defendant attempted to put the victim out of business; the government needed to show that the defendant obtained property to satisfy the Hobbs Act).

without regard for the facts in which those decisions arose.[22] For instance, the phrase "the gravamen of the offense is loss to the victim" has been repeated and misapplied so many times that courts have not appreciated how this phrase, standing alone, misinterprets the Hobbs Act. These courts have not appreciated the true nature of "extortion," and have essentially created a new crime that bears no resemblance to extortion under the Hobbs Act.

The text of the *Scheidler* opinion evidences this point. In response to Petitioners' argument that they were not liable under the Hobbs Act because they did not "obtain" "property" from the Respondents, the Seventh Circuit stated:

> In a similar vein, the Defendants assert that, even if "property" was involved, the Defendants did not "obtain" that property; they merely forced the Plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this Circuit, holding that "as a legal matter," extortionists can violate the Hobbs Act without either Seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim

---

[22] *See United States v. Green*, 350 U.S. 415 (1956). In *Green*, this Court held that a union and union officials could violate the Hobbs Act by attempting to obtain benefits for union members. In dicta, this court stated that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property." *Id.* at 420. This Court did not say, however, that it was unnecessary for property to be obtained.

is all that is required.[23]

The Seventh Circuit's reference to a "long line of precedent" is misguided. This statement is based on its own decision in *Stillo* that largely cites and applies dicta from prior decisions. In *Stillo,* the Seventh Circuit relied on *Lewis*[24] for the proposition that a "loss to, or interference with the rights of, the victim is all that is required" to violate the Hobbs Act.[25]

This quotation, dicta in the decision, involved a factual scenario different than the instant case, i.e., the defendants in Stillo actually obtained, and attempted to obtain, property.[26] The Seventh Circuit applied this dicta to Petitioners, forgetting to independently consider the "obtain" element of the Hobbs Act or consider the facts of

---

[23] *See Scheidler,* 267 F.3d at 709 (*citing Stillo,* 57 F.3d at 559). Abortion is not a property right, contrary to the reasoning of the Seventh Circuit in *Scheidler. See Libertad v. Welch,* 53 F. 3d 428 (1st Cir. 1995) (reasoning that a patient who was prohibited from entering a business for an appointment did not have standing to sue because she had not suffered an injury to "property").

[24] 797 F.2d at 358.

[25] *See Stillo,* 57 F.3d at 559.

[26] A review of *Stillo* demonstrates that the defendants were indicted and convicted of, among other things, conspiracy to commit extortion, an inchoate offense. They both were engaged in a several year pattern of obtaining bribes in exchange for arranging the outcome of criminal prosecutions. *See Stillo,* 57 F.2d at 555-56.

the cases that it relied on for its decision.[27] In the case *sub judice,* the Petitioners did not "obtain" Respondents' property, whether property is defined as tangible, intangible, or a liberty interest. Indeed, the Petitioners sought the opposite result: they did not want Respondents' "property".

In *United States v. Panaro,*[28] the Ninth Circuit addressed the question of whether a defendant is liable for extortion under the Hobbs Act if the defendant merely

---

[27] *See United States v. Hairston,* 46 F.3d 361, 365 (4th Cir. 1995) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where defendants forced various companies to make contributions to third party organizations) (*citing United States v. Santoni,* 585 F.2d 667, 673 (4th Cir. 1978)); *United States v. Carlock,* 806 F.2d 535, 555 (5th Cir. 1986) (stating, in dicta, that the "gravamen of the offense is loss to victim," where a defendant ordered a victim to make payments to a third party);. *Lewis,* 797 F.2d at 364 (stating, in dicta, that "[l]oss to the victim is the gravamen of the offense," where defendant attempted to extort money by ordering victim to deposit one million dollars into a third party's account) (*citing Frazier,* 560 F.2d at 887); *Santoni,* 585 F.2d at 673 (stating, in dicta, that the "gravamen of the offense is loss to the victim," where defendant forced victim to award contract to a third party) (*citing Frazier,* 560 F.2d at 887); *Frazier,* 560 F.2d at 887 (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant attempted to extort $150,000 from a bank by having that money deposited into a third party's account) (*citing United States v. Jacobs,* 451 F.2d 530, 535 (5th Cir. 1971); *United States v. Lance,* 536 F.2d 1065, 1068 (5th Cir. 1976) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant extorted money from a victim).

[28] 266 F.3d 939 (9th Cir. 2001).

"deprived" a victim of property. The Ninth Circuit held that an extortioner or a third party must actually *receive* property to be liable under the Hobbs Act.

This case is instructive for two reasons. First, it correctly interprets the plain language of Hobbs Act. Second, it correctly analyzes and applies past case law regarding the Hobbs Act. For instance:

> The four conspirators sought not only to put Blitzstein out of business, but actually to get his business interest for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of extortion or any benefit therefrom. The Hobbs Act does not require such proof." But *under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived.*[29]

Panuro reconciles the land mine of prior cases

---

[29] *Id.* at 934 (*quoting United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964)) (emphasis added). *See also United States v. Hyde*, 448 F. 2d 815, 843 (5th Cir. 1971) (stating that "[o]ne need receive no personal benefit to be guilty of extortion."); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958) (finding allegation that the defendants tried to put the victim out of business insufficient to show "obtaining" for purposes of robbery under the Hobbs Act).

regarding Hobbs Act extortion, and applies that law in a manner that comports both with the plain language of the statute and Congressional intent. Appellate courts such as the Seventh Circuit in *Scheidler* have failed to adequately appreciate the nature of extortion, or, alternatively, in their zeal to find a remedy for a victim of distasteful protest activities, these courts have "let the ends justify the means."[30] Failure to require that the defendant "obtain" property from the victim to commit the crime of extortion will result in untold damage to the First Amendment.[31]

Federal courts interpreting the "obtain" element of extortion under the Hobbs Act have historically required the extortioner to actually "get" or "obtain" "property" from a victim before RICO liability would attach.[32] However, several decisions, often cited out of context, have set the stage for the current problem.

In *United States v. Green*,[33] a union and a union

---

[30] *See United States v. Jackson*, 180 F.3d 380 (2d Cir. 1999) *with United States v. Arena*, 180 F.3d 55 (2d Cir. 1999). In *Jackson*, the Second Circuit relied on the common law tradition and Hobbs Act history (New York law) when construing a federal "extortion" statute. *Jackson* was not an abortion related case. By way of contrast, the Second Circuit in *Arena* relied on a Webster's Dictionary instead of a review of the common law tradition or Hobbs Act history (New York law) when construing the Hobbs Act. *Arena* was an abortion related case.

[31] *See* Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 704-712 (1999).

[32] *See supra*, note 10.

[33] 350 U.S. 415 (1956).

representative were indicted and convicted for Hobbs Act extortion. The trial judge set aside the verdict due to a lack of evidence that the defendants actually "obtained" "property" from the employer. This Court reversed the lower court's decisions and held that extortion under the Hobbs Act "in no way depends upon having a direct benefit conferred on the person who obtains the property."[34] In *Green*, a third party "obtained" the subject property.

Notwithstanding subsequent judicial misuse of *Green's* dicta, this Court recognized and applied the "obtain" element of the Hobbs Act. This Court held that culpability under the Hobbs Act exists if a third party "obtains" property; the defendant need not be the person that obtains the property.

Green stands for the proposition that someone must obtain property to violate the Hobbs Act. In *Green*, the defendants "obtained" property for third parties, which is a reasonable interpretation of "obtain" under Hobbs Act extortion. However, some appellate courts have misread *Green* to eliminate the "obtaining" requirement altogether.

In *United States v. Provenzano*,[35] the defendant was convicted of extortion under the Hobbs Act for threatening certain victims into paying money, i.e., "property," to another individual. The defendant, relying on *Green*, argued that he did not receive any "indirect" benefit from these payments.[36] While the Third Circuit did state, in dicta, that "[t]he gravamen of the offense (Hobbs Act extortion) is loss to the victim," it ultimately held:

---

[34] *Id.* at 420.

[35] 334 F.2d 678 (3d Cir. 1964).

[36] *Id.* at 686.

> In view of the foregoing authorities we hold that it is not necessary to prove that the extortioner himself, either directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. It is enough that payments were made at the extortioner's direction to a person named by him.[37]

The most disturbing factor of *Provenzano* is the statement, taken out of context by subsequent courts, that the "gravamen of the offense is loss to the victim." This statement did not reflect the holding of *Provenzano*. The statement is, in part, correct; however, taken alone it is not a correct statement of Hobbs Act extortion law, as many courts have held.

In *Northeast Women's Center, Inc. v. McMonagle*,[38] the Third Circuit held pro-life demonstrators liable to abortion clinic owners under RICO. In *McMonagle*, an abortion clinic sued twenty six pro life demonstrators for activities arising from four protests at the clinic. At trial, the plaintiff presented evidence that showed that the defendants trespassed on clinic property on four different occasions. Defendants made their intentions very clear that they wanted to "shut down" the Plaintiff's abortion clinic.[39]

McMonagle is problematic for a variety of reasons. First, the Third Circuit ignored the "obtain" element of the Hobbs Act, notwithstanding the fact the defendants' raised

---

[37] *Id.*

[38] 868 F.2d 1342 (3d Cir. 1989).

[39] *Id.* at 1346.

the issue on appeal.[40] The Third Circuit's silence on this issue is both perplexing and disturbing. Second, the Third Circuit ignored common law and statutory precedents, i.e., New York law, of the Hobbs Act, notwithstanding the fact that Third Circuit precedent analyzed this exact issue in *United States v. Nedley*[41] and *United States v. Sweeney*.[42]

Finally, the Third Circuit allowed the concept of "intangible" property rights to abrogate the requirement that an extortioner "obtain" property under the Hobbs Act. Amici does not dispute the reasonableness of construing "intangible" property within the ambit of Hobbs Act "property." It is a non sequitur to conclude, however, that an extortionist need not "obtain" those intangible property rights to be held liable under the Hobbs Act. If the defendants in *McMonagle* actually appropriated clinic services for themselves or for the benefit of a third party, then it would have been appropriate to hold them liable under the Hobbs Act, and therefore RICO. That did not happen. The Third Circuit's lack of analysis created the unjust result in which the defendants were deemed extortionists for simple trespass.

---

[40] *See* Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. at 691 n. 157. At trial, defendants' counsel also objected to a proposed jury instruction that did not properly reflect the New York Standard Criminal Jury Instruction requirement regarding the fact that to be liable of extortion, the alleged extortioner must do something more than merely cause an alleged victim to surrender property. This is invariably always the case in situations involving advocacy groups. *Id.*

[41] 255 F.2d 350 (3d Cir. 1958).

[42] 262 F.2d 272 (3d Cir. 1959).

In order to clarify the "obtaining" element of extortion under the Hobbs Act and to prevent further damage to the First Amendment, this Court should reverse the Seventh Circuit in *Scheidler* and construe extortion under the Hobbs Act to require an alleged extortionist to "obtain" property. Reversing *Scheidler* necessarily requires disapproval of cases such as *McMonagle* that ignored the requirement, together with cases such as *Scheidler* that misunderstood the requirement by relying on dicta from prior decisions.

If *Scheidler* is allowed to remain law, a pattern of litigation will continue that chills the constitutionally protected speech of both popular and unpopular social advocacy groups.[43] *Scheidler* will logically cause environmental advocacy groups to fall within the ambit of RICO. Groups such as Greenpeace routinely engage in activities similar to those alleged against the Petitioners in *Scheidler,* namely trespass, assault, and distasteful conduct. Hobbs Act extortion was intended to implicate something different and more insidious than this type of annoying behavior.

Animal advocacy groups such as People for the Ethical Treatment of Animals ("PETA") will likewise face the possibility of harsh civil and criminal penalties for

---

[43] *See Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142 (4th Cir. 1997) (dismissing RICO claims against demonstrator defendants due to insufficient evidence without questioning whether RICO applied to the demonstrators at Plaintiff's clinic); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999) (reasoning that a person has "obtained" property under the Hobbs Act when their conduct or threats cause a person to voluntarily give up their right to conduct a business free from threats of violence and physical harm).

benign protest activities.[44] PETA routinely uses methods similar to those of Petitioners in *Scheidler*. There is no logical reason why *Scheidler's* reasoning will not extend to their activities as well.

Amici, State of Alabama, point out that *Scheidler* will invariably begin a pattern of litigation against governmental actors that allege RICO violations stemming from traditional governmental functions such as land use permitting.[45] RICO will clearly implicate governmental actors if they are not required to "obtain" or "get" property, but instead simply interfere with the rights of another. There are federal statutes and[46] and constitutional provisions[47] that prevent governmental bodies from acting with impunity, and certain improper governmental activity will still remain subject to RICO.[48] However, these situations involve cases where governmental actors actually "obtained" property from a victim, not situations where someone's freedom of choice was limited, but where no one, either the extortionist or a third party, actually obtained

---

[44] *See Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999).

[45] Amicus Brief of State of Alabama at 9.

[46] 42 U.S.C. § 1983.

[47] *See* U.S. Const. amends. V & XIV; *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955); *Palazzolo v. Rhode Island*, 533 U.S. 606 (1897).

[48] *See Evans v. United States*, 504 U.S. 255, 268 (1992) (finding RICO liability against certain county commissioners); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F. 2d 328, 341 (2d Cir. 1985) (*citing* the Hobbs Act in upholding an injunction against state attorneys general).

property.

Civil rights groups, such as the Southern Christian Leadership Conference ("SCLC") and the National Association for the Advancement of Colored People ("NAACP"), can expect RICO lawsuits if *Scheidler* remains the law. In an effort to achieve political or social ends, these groups have either used boycotts or demonstrations as means to those ends, as did the Petitioners in *Scheidler*. Under the peculiar notion of extortion announced in *Scheidler*, the SCLC and the NAACP can expect RICO lawsuits for their benign conduct if *Scheidler* remains the law.

If *Scheidler* is not reversed, the First Amendment will suffer great damage. By requiring an alleged extortionist to "obtain" property in order to violate the Hobbs Act, this Court will bring the Hobbs Act within its common law and New York law history, and at the same time salvage the right to free speech.

III. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully Submitted,

Garry J. Rhoden, Esquire
Florida Bar No. 139955
GRAY HARRIS
Post Office Box 3324
Tampa, Florida 33601-3324
(813) 273-5000-Phone

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
Joel L. Oster
Kansas Bar No. 18547
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(18) (15)

Nos. 01-1118, 01-1119

In the Supreme Court of the United States

JOSEPH SCHEIDLER, et al., Petitioners,
v.
NATIONAL ORGANIZATION
FOR WOMEN, INC., et al., Respondents.

OPERATION RESCUE, Petitioner,
v.
NATIONAL ORGANIZATION
FOR WOMEN, INC., et al., Respondents.

On Writs of Certiorari To The United States
Court of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

WILLIAM J. MERTENS*
Asbill Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

**Counsel of Record*

Dated: July 12, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST
OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

THE PLAIN MEANING AND COHERENT APPLICATION OF THE OFFENSE OF "EXTORTION" WITHIN THE MEANING OF THE HOBBS ACT, 18 U.S.C. § 1951, BOTH REQUIRE PROOF (A) THAT THE ALLEGED OFFENDER TOOK PROPERTY OF THE VICTIM, AND (B) THAT THE PROPERTY WAS OF A KIND THAT IS CAPABLE OF BEING TAKEN BY ANOTHER.. 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 7

United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) ... 7, 8

United States v. Heimowitz, 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) 9

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) 9, 10

United States v. Stillo, 57 F.3d 553 (7th Cir. 1995) 7-9

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 4

Statutes and Rules

18 U.S.C. § 1341 6

18 U.S.C. § 1951 ..... 2, 4, 5, 7, 10

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

Miscellaneous

Brian J. Murray, *Note, Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) 6, 10, 11

Brief of the United States, in *Cleveland v. United States* (No. 99-804) 6

Webster's New International Dictionary (1917) 6

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL is committed to preserving fairness within the American criminal justice system. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives are to

---

[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus and counsel, have made a monetary contribution to the preparation or submission of this brief. The petitioners and respondents have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

ensure that appropriate measures are taken to safeguard the rights of all person involved in the criminal justice system and to promote the proper administration of justice.

This brief is limited to Question 1 on which certiorari was granted, concerning the meaning and application of the Hobbs Act, 18 U.S.C. § 1951.

SUMMARY OF ARGUMENT

The Hobbs Act, 18 U.S.C. § 1951(a), punishes by up to 20 years' imprisonment actual or attempted extortion, or conspiracies to commit extortion, that impede commerce. The definition of "extortion" in § 1951(b)(2) requires proof of "obtaining of property from another." Despite these seemingly clear words, the court of appeals in this case held that it is enough if there is a loss to, or interference with the rights of, the victim, and the court included abstract and intangible interests within the definition of property, such as the right to conduct a business. Thus, the court eliminated any requirement of proof of a larceny-type offense.

The Hobbs Act construction that the court of appeals adopted is unjustified and should be rejected. Most simply, it cannot be squared with the statutory language, and federal courts should not define crimes more broadly than they are defined by the actual words

that Congress employed. The court of appeals' broad conception of extortion under the Hobbs Act seems to have crept into the court's decisions without reasoned consideration of the statutory language and is not entitled to deference. This expansion of the Hobbs Act would allow it to reach all sorts of mundane crimes of violence whose prosecution should be left to state law or narrower federal criminal prohibitions.

ARGUMENT

THE PLAIN MEANING AND COHERENT APPLICATION OF THE OFFENSE OF "EXTORTION" WITHIN THE MEANING OF THE HOBBS ACT, 18 U.S.C. § 1951, BOTH REQUIRE PROOF (A) THAT THE ALLEGED OFFENDER TOOK PROPERTY OF THE VICTIM, AND (B) THAT THE PROPERTY WAS OF A KIND THAT IS CAPABLE OF BEING TAKEN BY ANOTHER.

Chief Justice Marshall wrote in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Whatever else this principle stands for, it must mean that common words in a federal criminal statute should not be stretched and distorted to extend the reach of a statute further than Congress's language itself fairly takes it.

A stranger to these proceedings or to the federal criminal law who for the first time read the Hobbs Act, 18 U.S.C. § 1951, would have no trouble understanding

the essential nature of the offense. Section 1951(a) states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

These words focus on acts or threats of robbery or extortion, or attempts or conspiracies to commit those offenses. The exact circumstances when robbery or extortion becomes a Hobbs Act violation may be less than clear to a reader encountering these words for the first time, but the necessary tie to robbery and extortion is unmistakable.

Section 1951(b)(2) then defines "extortion." It is "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2). The essential meaning of these words is equally clear. Property must be *obtained*—a perfectly common, generally understood word, meaning taken or acquired—*from another*, which

also is a perfectly clear concept.[2] The words of the statute make clear the essential meaning of the acts constituting "extortion." And from that meaning, it follows that the property that can be the object of an act of extortion, or an extortionate threat, plan, etc., is "property" that is susceptible to being obtained or acquired from another. An abstract property interest that may be lost, devalued, or destroyed, but not transferred to or appropriated by another, cannot be the object of extortion. A recent examination of the Hobbs Act and the historical meaning of "extortion" also reached the conclusion that "obtaining" property requires that someone acquire the property, not just that it be lost, impaired, or destroyed. Brian J. Murray, *Note, Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 704-712 (1999).

---

2 *Cf.* Brief of the United States, at 11-12, in *Cleveland v. United States* (No. 99-804). That case involved the federal mail fraud statute, 18 U.S.C. § 1341, an offense whose definition includes the phrase "for obtaining money or property." The United States' brief cites various modern and older dictionary definitions of the verb "to obtain," all of which incorporate the idea of acquiring, not destroying or impairing, something. *E.g.*, *Webster's New International Dictionary* 1485 (1917) (defining "obtain" as "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way") (first definition).

Clear though these points may seem, the Seventh Circuit held that destroying or impairing property may suffice for a Hobbs Act conviction. The court of appeals also held that an abstract property interest that is insusceptible of being taken by another may be the object of extortion. Petitioners asserted in the court of appeals that the property interests asserted by respondents here, *viz.*, "the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses," could not constitute "property" within the meaning of "extortion" as defined in 18 U.S.C. § 1951(b)(2). *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). Petitioners also argued that they "did not 'obtain' that property; they merely forced the plaintiffs to part with it," and that this does not constitute "extortion." *Id.*

The Seventh Circuit was casual and dismissive in rejecting these arguments. The court merely referred to "a long line" of its own precedent "that intangible property such as the right to conduct a business" suffices, *id.* (citing *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)), and that "'an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'" *Id.* (quoting *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.

1995)). The court of appeals did not try to show how the actual statutory language could bear these meanings.

In fact, there is no "long line" of precedent supporting the lower court's decision. Even in the Seventh Circuit, the pedigree for the court's construction of the Hobbs Act rules is unimpressive. In *Anderson*, the court of appeals found that there was sufficient evidence to support a Hobbs Act conviction. That case involved a kidnaping, accompanied by threats, committed to persuade a physician to stop performing abortions. 716 F.2d at 450. But that decision does not fairly support the court's Hobbs Act construction here. The defendant in *Anderson* challenged only the evidence of obstruction of commerce. He did not challenge the evidence for failure to show an actual taking of property and did not challenge the kind of the property involved. *Id.* Thus, the decision is not really on point. And in sustaining Anderson's conviction, the court of appeals cited no prior decisions of its own or of any other court.

Stillo also is weak precedent for the Hobbs Act construction that the court of appeals applied in the present case. There, the court affirmed racketeering convictions predicated upon the Hobbs Act. 57 F.3d at 559. But tangible property, namely money, undoubtedly was taken; the case involved cash bribery in the Cook County, Illinois court system. *Id.* at 555-57. A defendant argued that proof of extortion was insufficient, but the

court found that "as a factual matter the evidence was more than sufficient for the jury to find that the Stillos conspired to extort money . . . ." *Id.* at 559.

The court in *Stillo* did add the gratuitous comment that "an extortionist can violate the Hobbs Act without ever seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Id.* But the point was utterly unnecessary. And the only prior support that the court cited was *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987). *Lewis*, in turn, involved attempted extortion of $1 million from the manufacturer of the pain reliever Tylenol by threat of poisoning Tylenol capsules with cyanide. *Id.* at 362-63. This obviously shows classic extortion. The only unusual wrinkle was that the defendant claimed that his true motive was to harm his wife's former employer, into whose bank account he instructed the manufacturer to deposit the funds. *Id.* at 363-64. The court held there was sufficient evidence of extortionate intent, citing among other cases a decision of the Eleventh Circuit that one may be guilty of extortion by obtaining property for another. *Id.* at 364 (citing *United States v. Heimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984)). Self-evidently, that is a different point.

To be sure, the *Lewis* opinion also contained gratuitous dicta. The court went on to state that "the

defendant would have violated § 1951 if, for example, he had simply demanded that Johnson & Johnson burn $1 million in cash." 797 F.2d at 364. But this statement was unnecessary to the court's decision, and the court made no effort to reconcile this statement with the statutory language. The court did not try to explain how "obtaining" property possibly could mean causing the owner to destroy it.

In short, support for the construction of the Hobbs Act that the court of appeals applied in this case is thin and unreasoned. The lower court's decision in this case never explains how a person may "obtain" property of another, without receiving, acquiring, or taking it, or even causing the possessor to deliver it to a third person. The decision also is silent on how "property" may qualify as the object of extortion when, like the intangible right to conduct one's business or profession, it may be capable of being impaired but is incapable of being acquired by another. Further, the decision in this case does not rest upon any long-established understanding of the statute. On the contrary, the Seventh Circuit seems to have arrived at its view of the Hobbs Act unnecessarily and casually, without considered examination of the statutory language. *See also* Brian J. Murray, *supra*, 75 NOTRE DAME L. REV. at 718-19 (criticizing judicial expansion of offense of extortion as unreasoned and ahistorical).

Loosening of requirements for conviction under the Hobbs Act threatens to expand that statute beyond reason. The *Notre Dame Law Review* note points out that this loosening destroys the distinction between "extortion" and the common law crime of "coercion." *See id.* More broadly, it destroys the distinction between a larceny-type offense and a malicious destruction of property-type offense. If *both* the concepts of "obtaining" and "property of another" within the definition of extortion in 18 U.S.C. § 1951(b)(2) are loosened, then extortion under the Hobbs act will have become a general crime of violence. When any kind of property or liberty interest, loosely defined, is impaired, destroyed or damaged, then a Hobbs Act prosecution may lie, provided only that there is sufficient nexus with commerce. The range of cases that could lead to Hobbs Act prosecutions would expand enormously: A road-rage assault or even threat, if it interrupts interstate traffic; maliciously letting the air out of the tires of a neighbor's car, if it interferes with a morning commute; even a fight outside a bar at least if it keeps a patron from going inside; and countless other examples. All these now could become Hobbs Act violations. Such expansion of the statute is unjustified.

This is not to say that such acts should go unpunished. But the courts should not reach beyond the enacted language to turn such violations of state law into severely punished federal felonies. Without a clearer

statement from Congress that such acts should be prosecuted in federal court, and subject the offenders to 20 years in federal prison, they should not be deemed extortion within the meaning of the Hobbs Act.

CONCLUSION

The decision of the court of appeals should be reversed. The definition of extortion within the Hobbs Act, 18 U.S.C. § 1951(b)(2), should be applied according to its actual terms, which require obtaining or taking property from another.

Dated: July 12, 2002

Respectfully submitted,

WILLIAM J. MERTENS*
Asbill Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

Counsel for Amicus Curiae the National Association of Criminal Defense Lawyers

**Counsel of Record*

Supreme Court, U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

ORIGINAL

(9) (16)

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,
and
OPERATION RESCUE,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF NEITHER PARTY

RAYMOND J. LAJEUNESSE, JR.*
WILLIAM L. MESSENGER
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

COUNSEL FOR *AMICUS*
**Counsel of Record*

July 2002

40 Pgs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Under *Enmons*, Petitioners' Objectives Must Be Wrongful to Establish Liability 3

A. *Emmons* Holds That a Wrongful Objective Is a Prerequisite for Extortion 3

B. Petitioners Are Not Liable for Extortion Under *Enmons* Because Their Objective Is Not Wrongful 5

II. *Enmons'* Interpretation of the Hobbs Act Cannot Be Limited to the Labor Context 6

A. *Enmons* Is a Textual Interpretation of the Hobbs Act 6

B. *Stare Decisis* Requires That *Enmons* Be Followed, Regardless of Its Negative Ramifications, Unless the Supreme Court Overrules the Decision 8

TABLE OF CONTENTS-CONTINUED

Page

III. The Ramifications of Applying *Enmons'* Interpretation of Extortion Under the Hobbs Act Are Unpalatable 11

IV. *Enmons* Must Be Overruled 13

A. *Enmons* Should Be Overruled Under the Rationales Utilized in *Hubbard v. United States* 14

(1) Lower Court Jurisprudence Is a Competing Legal Doctrine Entitled to *Stare Decisis* Effect 15

(2) Refusal of Lower Courts to Follow *Enmons* for Fear That It Undermines the Hobbs Act Demonstrates Its Impropriety 18

B. *Enmons* Is a "Seriously Flawed Opinion" 20

(1) *Enmons* Is Contrary to the Plain Language of the Hobbs Act 20

(2) Legislative History Does Not Support *Enmons* 22

C. *Stare Decisis* Is Undermined by Lack of a Reliance Interest in *Enmons* 25

TABLE OF CONTENTS-CONTINUED

Page

D. *Enmons'* Ramifications Justify Overruling It 27

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 1

Agostini v. Felton,
521 U.S. 203 (1997) 10

Air Line Pilots Association v. Miller,
523 U.S. 866 (1998) 1

Allen v. Machinists Local 1297,
120 L.R.R.M. (BNA) 2501 (Ohio. Ct. App. 1984),
rev'd in part, 490 N.E.2d 865 (Ohio 1986) 1

Bell v. Reno,
218 F.3d 86 (2d Cir. 2000) 21

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993) 5

Brogan v. United States,
522 U.S. 398 (1998) 9,19

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,
140 F.3d 494 (3d Cir. 1998) 21

C & W Construction Co. v. Brotherhood of Carpenters & Joiners, Local 745,
687 F. Supp. 1453 (D. Haw. 1988) 6,7

TABLE OF AUTHORITIES-CONTINUED

Page

Chicago Teachers Union, Local 1 v. Hudson,
475 U.S. 292 (1986) 1

Commonwealth v. Coolidge,
128 Mass. 55 (1880) 16

Communications Workers v. Beck,
487 U.S. 735 (1988) 1

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 25

Crawford v. United Steelworkers,
335 S.E.2d 828 (Va. 1985) 1

Domestic Linen Supply & Laundry Co. v. Central States, Southeast & Southwest Areas Pension Fund,
722 F. Supp. 1472 (E.D. Mich. 1989) 17

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 1

Hall American Center Associates Limited v. Dick,
726 F. Supp. 1083 (E.D. Mich. 1989) 7,16

Hilton v. South Carolina Public Railways Commission,
502 U.S. 197 (1991) 25

Hinote v. Local 4-23, Oil, Chemical & Atomic Workers,
777 S.W.2d 134 (Tex. Ct. App.), error denied,
(Tex. 1989) 1

TABLE OF AUTHORITIES-CONTINUED

Page

Hohn v. United States,
524 U.S. 236 (1998) 11

Hubbard v. United States,
514 U.S. 695 (1995) ..... *passim*

Lehnert v. Ferris Faculty Association,
500 U.S. 507 (1991) 1

McCormick v. United States,
500 U.S. 257 (1991) 21

Murphy Exploration & Product Co. v. U.S. Department of the Interior,
252 F.3d 473 (D.C. Cir. 2001) 21

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 12

National Organization of Women v. Scheidler,
267 F.3d 687 (7th Cir. 2001) 5

Overnite Transportation Co. v. Teamsters,
168 F. Supp. 2d 826 (W.D. Tenn. 2001) ..... *passim*

Patterson v. McLean Credit Union,
485 U.S. 617 (1988) 10

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 15

TABLE OF AUTHORITIES-CONTINUED

Page

People v. Beggs,
172 P. 152 (Cal. 1918) 16

People v. Fichtner,
114 N.E.2d 212 (N.Y. 1953) 24

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 9

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 10,11

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) 12

In re Sherin,
130 N.W. 761 (S.D. 1911) 16

State v. Bruce,
24 Me. 71 (1844) 16

State v. Phillips,
115 P.2d 418 (Idaho 1941) 16

Stirone v. United States,
361 U.S. 212 (1960) 11,13,24,26

Terzi Productions, Inc. v. Theatrical Protective Union,
2 F. Supp. 2d 485 (S.D.N.Y. 1998) 5,16,17

TABLE OF AUTHORITIES-CONTINUED

Page

Town of West Hartford v. Operation Rescue,
915 F.2d 92 (2d Cir. 1990) 21

United States v. Agnes,
753 F.2d 293 (3d Cir. 1985) 7

United States v. Bramblett,
348 U.S. 503 (1955) ..... *passim*

United States v. Castor,
937 F.2d 293 (7th Cir. 1991) 16,19

United States v. Cerilli,
603 F.2d 415 (3d Cir. 1979) 9,11,17

United States v. Clemente,
640 F.2d 1069 (2d Cir. 1981) 5,21

United States v. Culbert,
435 U.S. 371 (1978) 24

United States v. Debs,
949 F.2d 199 (6th Cir. 1991) 11,17,19

United States v. Enmons,
410 U.S. 396 (1973) ..... *passim*

United States v. French,
628 F.2d 1069 (8th Cir. 1980) 9,11,17

TABLE OF AUTHORITIES-CONTINUED

Page

United States v. Gill,
490 F.2d 233 (7th Cir. 1973) 24

United States v. Green,
350 U.S. 415 (1956) 22,23,24,26

United States v. Hoelker,
765 F.2d 1422 (9th Cir. 1985) 24

United States v. International Business Machines Corp.,
517 U.S. 843 (1996) 25

United States v. Jones,
766 F.2d 994 (6th Cir. 1985) 17,19

United States v. Local 807, Teamsters
315 U.S. 521 (1942) 22

United States v. Mulder,
273 F.3d 91 (2d Cir. 2001), *cert. denied sub nom.*
Johnson v. United States, ___ U.S. ___,
122 S. Ct. 1344 (2002) 8

United States v. Pignatelli,
125 F.2d 643 (2d Cir. 1942) 24

United States v. Porcaro,
648 F.2d 753 (1st Cir. 1981) 9,11,16,17

United States v. Quinn,
514 F.2d 1250 (5th Cir. 1975) 17

TABLE OF AUTHORITIES-CONTINUED

Page

United States v. Russo,
708 F.2d 209 (6th Cir. 1983) 4,11,16

United States v Snyder,
930 F.2d 1090 (5th Cir. 1991) 21

United States v. Stofsky,
409 F. Supp. 609 (S.D.N.Y. 1973) 17

United States v. Sturm,
870 F.2d 769 (1st Cir. 1989) 6,9,11,21

United States v. Sturman,
49 F.3d 1275 (7th Cir. 1995) 15

United States v. Taylor,
92 F.3d 1313 (2d Cir. 1996) 8

United States v. Traitz,
871 F.2d 368 (3d Cir. 1989) 4

United States v. Warledo,
557 F.2d 721 (10th Cir. 1977) 17

United States v. Zappola,
677 F.2d 264 (2d Cir. 1982) 7,9,16

United States v. Zappola,
523 F. Supp. 362 (S.D.N.Y. 1981),
aff'd, 677 F.2d 264 (2d Cir. 1982) 17

TABLE OF AUTHORITIES-CONTINUED

Page

Viacom International, Inc. v. Icahn,
747 F. Supp. 205 (S.D.N.Y. 1990) 5,21

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 12

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I 12

18 U.S.C. § 1001 ..... *passim*

Hobbs Act,
18 U.S.C. § 1951 1
18 U.S.C. § 1951(a) 11,13
18 U.S.C. §1951(b) 22
18 U.S.C. § 1951(b)(2) 3,20

Anti-Racketeering Act of 1934, 48 Stat. 979, § 2 22
U.S. Supreme Court Rule 37.6 1

MISCELLANEOUS

4 A.L.R. Fed. 881 (1970) 21

91 Cong. Rec. 11908 8

H.R. 238, 79th Cong., 1st Sess., 9 (1945) 24

INTERESTS OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states.[1]

The Foundation gives legal aid to employees who have been physically injured by union violence as a result of exercising their legal rights. *Crawford v. United Steelworkers*, 335 S.E.2d 828 (Va. 1985); *Allen v. Machinists Local 1297*, 120 L.R.R.M. (BNA) 2501 (Ohio Ct. App. 1984), *rev'd in part*, 490 N.E.2d 865 (Ohio 1986); *Hinote v. Local 423, Oil, Chemical & Atomic Workers*, 777 S.W.2d 134 (Tex. Ct. App.), *error denied*, (Tex. 1989). The Foundation also has provided counsel in most United States Supreme Court cases involving the right to refrain from joining or supporting a labor organization as a condition of employment. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

This case marks a watershed moment for the statutory construction of the Hobbs Act, 18 U.S.C. § 1951, as enunciated

---

[1] Pursuant to Supreme Court Rule 37.6, the Foundation states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Foundation, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

in *United States v. Enmons*, 410 U.S. 396 (1973). This Court is confronted with the stark choice of applying *Enmons* to the conduct of Petitioners, or overruling the case. The Foundation, in its role supporting many of the most significant cases dealing with the abuses of compulsory unionism that have come before this Court and numerous lower courts, provides a unique perspective on this specific issue, and can aid the Court in analyzing this case.

This brief is filed with all parties' consent already on file with the Court.

SUMMARY OF ARGUMENT

In *Enmons*, a closely divided Court (5-4) construed the definition of "extortion" under the Hobbs Act to require that the "obtaining of property" be "wrongful." 410 U.S. at 399-400. Petitioners Scheidler, *et al.*, and Operation Rescue ("Petitioners" or "the protesters") seek to stop abortion, which is not a wrongful objective. Accordingly, under *Enmons*, an extortion claim under the Hobbs Act cannot be maintained against them.

The lower courts (but never this Court) have unanimously refused to apply *Enmons* beyond its case specifics for fear that "it could effectively repeal the Hobbs Act." *See* n.4, *infra*. This apprehension is well founded, for exempting all defendants seeking a legitimate objective from sanction would undermine the entire extortion prong of the Act. However, it is doctrinally untenable for a statutory interpretation of this Court to be arbitrarily limited because of its negative ramifications. *Stare decisis* commands that a Supreme Court construction of a statute be followed, unless this Court sees fit to overrule it.

The unpalatable ramifications of *Enmons* dictate overruling the decision, not artificially limiting its breadth. A statutory interpretation that cannot be generally applied, lest it subvert the

statute itself, is inherently flawed. This Court should overrule *Enmons* and reinstate the Hobbs Act's plain meaning, in which a wrongful objective is not a criterion for extortion.

ARGUMENT

I. Under *Enmons*, Petitioners' Objectives Must Be Wrongful to Establish Liability.

A. *Enmons* Holds That a Wrongful Objective Is a Prerequisite for Extortion.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). In *Enmons*, this Court held that the term "wrongful" applies not only to the means employed, but also to the "property" the defendant is seeking to "obtain." 410 U.S. at 399-400.

Enmons involved violent acts of property destruction by striking employees. Militants blew up a transformer substation, drained oil from one transformer, and shot three transformers with highpowered rifles. *Id.* at 398. The union was prosecuted for extortion under the Hobbs Act. The government contended that the "wrongfulness" element in the Act's statutory definition of extortion applies only to the means listed (force, violence, fear, color of official right), and is easily satisfied by the destruction of property. *Id.* at 399-400.

The *Enmons* majority rejected the government's argument that the adjective "wrongful" applies only to the means used:

> [The government's] interpretation of the Act slights the wording of the statute that proscribes obtaining property only by the "wrongful" use of actual or threatened force, violence, or fear. The term "wrongful," which on the face

> of the statute modifies the use of each of the enumerated means of obtaining property–actual or threatened force, violence, or fear–would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the Government acknowledges, any violence or force to obtain property is "wrongful."

Id. (footnotes omitted). Instead, the term "wrongful" was held to modify the phrase "obtaining of property." *Id.* at 400 ("'wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property").

Construing the definition of extortion in this fashion, the *Enmons* majority found certain union objectives, such as higher wages and benefits, not to be wrongful, resulting in "no 'wrongful' taking of the employer's property." *Id.* Dismissal of the extortion claim was affirmed.

Enmons, therefore, holds that extortion under the Hobbs Act requires both a wrongful means and a wrongful end. As Judge Holschuh of the Sixth Circuit summarized:

> [A]s I read *Enmons,* use of wrongful *means*–and the use of violence on a picket line is clearly wrongful–is not enough to come within the coverage of the Act. To come within the prohibitions of the Act the *objective* must be wrongful, *i.e.,* the use of robbery or extortion or violence to obtain property to which the defendant "has no lawful claim."

United States v. Russo, 708 F.2d 209, 223 (6th Cir. 1983) (Holschuh, J., concurring) (emphasis in original); *see also United States v. Traitz*, 871 F.2d 368, 381 (3d Cir. 1989) ("in *Enmons* the Supreme Court found that an alleged extortionist must not only employ an unlawful *means* but must act in pursuit

of an unlawful *end*") (emphasis in original); *United States v. Clemente,* 640 F.2d 1069, 1076 (2d Cir. 1981) ("Extortion, as defined in the Hobbs Act, consists of the use of wrongful means to achieve a wrongful objective"); *Viacom Int'l, Inc. v. Icahn*, 747 F. Supp. 205, 210 (S.D.N.Y. 1990) ("There are two elements to a Hobbs Act violation: wrongful means and wrongful objective"); *Terzi Prods., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 505 (S.D.N.Y. 1998) ("[*Enmons*] found that [misconduct] had to be wrongful both in its means and in its ends").

B. Petitioners Are Not Liable for Extortion Under *Enmons* Because Their Objective Is Not Wrongful.

Enmons' construction of the Hobbs Act requires that Respondents demonstrate that it is "wrongful" for the protesters to obtain, or try to obtain, the objective which they seek. In this case, the protesters' objective is to stop abortions. *See National Organization of Women v. Scheidler*, 267 F.3d 687, 693 (7th Cir. 2001) ("defendant's goal is frankly to prevent abortions from taking place"). Opposing abortion and seeking to limit the performance of abortions is a legitimate objective:

> "[A] value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures.

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993) (citations omitted).

Respondent National Organization for Women ("NOW") contends that "Petitioners here had no lawful claim to obtaining Respondents' property, namely their right to do business with one another." (NOW Opposition to Petition for Certiorari ("NOW Opp.") at 21.) NOW confuses the means with the ends.

The protesters do not seek to obtain Respondents' business. Their objective is to stop abortion. Disruption of an abortion clinic's business operations is merely the protesters' means of achieving this end.

In *Enmons*, the union's violent strike was designed to interfere with business operations. That disruption was not employed for its own sake, but "to obtain for the striking employees higher wages and other employment benefits from the Company." 410 U.S. at 398. The Court recognized that favorable employment terms were the property the union sought to obtain, not the employer's business operations.

Similarly, the protesters do not endeavor to disrupt the business operations of a health clinic just for the sake of doing so. Rather, their actions are a means of obtaining their overriding objective: stopping abortion. Thus, the protesters are not liable under *Enmons*.

II. *Enmons'* Interpretation of the Hobbs Act Cannot Be Limited to the Labor Context.

A. *Enmons* Is a Textual Interpretation of the Hobbs Act.

Respondent NOW contends that the legitimacy of the protesters' objective should not be considered because *Enmons* is limited to the collective bargaining context. (NOW Opp. at 21.) *Enmons* provides a textual interpretation of the definition of "extortion." Textual interpretations are of general application and do not vary based upon to whom a statute is being applied.

"The main issue before the Supreme Court [in *Enmons*] was whether the term 'wrongful' in the statute applied to the means used or to the ends sought by the alleged extortioner." *United States v. Sturm*, 870 F.2d 769, 772 (1st Cir. 1989); *see also C & W Constr. Co. v. Brotherhood of Carpenters &*

Joiners, Local 745, 687 F. Supp. 1453, 1468 (D. Haw. 1988) ("In interpreting the Hobbs Act, the Court focused on the word 'wrongful'"). The *Enmons* majority concluded that the term "wrongful" applies to the phrase "obtaining of property." 410 U.S. at 399-400 n.3; *see also Hall Am. Ctr. Assoc. Ltd. v. Dick*, 726 F. Supp. 1083, 1095 (E.D. Mich. 1989) ("*Enmons* interpreted 'extortion' in the Hobbs Act as consisting of the use of wrongful means to achieve a wrongful objective").

Some lower courts have justified restricting *Enmons* to union violence on the basis of the Court's analysis of legislative history. *See United States v. Agnes*, 753 F.2d 293, 298 (3d Cir. 1985); *United States v. Zappola*, 677 F.2d 264, 269 (2d Cir. 1982). *Enmons* cited legislative history for the proposition that Congress did not consider legitimate union goals to be wrongful objectives proscribed by the Hobbs Act. 410 U.S. at 401-08.[2] However, the Court's consideration of the legitimacy of the union's objectives proves that the *Enmons* majority saw a wrongful objective as a textual criterion for extortion under the Act. If the term "wrongful" did not modify "obtaining of property" in the definition of extortion, the legitimacy of the objective sought would be irrelevant.

The *Enmons* Court's consideration of the wrongfulness of the property the defendant sought is the result of statutory construction. In *Enmons*, the government argued that the legitimacy of the obtaining of property is irrelevant under the Hobbs Act. *Id.* at 400 n.3 (when "'wrongful' force and violence are used, even for a legal objective, the Government contends

---

[2] Congress intended that "illegitimate objectives . . . , such as the exaction of personal payoffs, . . . not be exempted from the Act." 410 U.S. at 407. But, the majority concluded, legitimate union objectives, "such as higher wages in return for genuine services," *id.* at 400, were meant to be exempt from sanction.

that the statute is satisfied"). The Court's majority rejected this contention on textual grounds: "that interpretation simply accepts the redundancy of the term 'wrongful' whenever it applies to 'force' and 'violence' in the statute." *Id.* Thus, the Court held that the obtaining of property must also be "wrongful." *Id.* Legislative history was even utilized to support this construction of the statute's language. *See id.* at 399 n.2 ("Congressman Hobbs indicated that 'wrongful' was to modify the entire section") (citing 91 Cong. Rec. 11908).

It is arbitrary to limit *Enmons*' interpretation of the Hobbs Act only to unions, as Respondent NOW suggests. The adjective "wrongful" would have to modify the term "obtaining property" only when a union is a defendant, but not when the statute is being applied to anyone else. The rules of grammar are not altered when a union happens to be a defendant.

B. *Stare Decisis* Requires That *Enmons* Be Followed, Regardless of Its Negative Ramifications, Unless the Supreme Court Overrules the Decision.

Although *Enmons* is a statutory construction, lower courts nonetheless have limited it to "a labor exception to culpability for Hobbs Act extortion," *United States v. Mulder*, 273 F.3d 91, 104 (2d Cir. 2001), *cert. denied sub nom. Johnson v. United States*, __ U.S. __, 122 S. Ct. 1344 (2002); *see also United States v. Taylor*, 92 F.3d 1313, 1319 (2d Cir. 1996) (*Enmons* is a "labor exception" to the Act). This is based on fear of the decision's odious ramifications: "Despite its broad language, most federal appellate courts, including this court, have restricted *Enmons* and its claim of right defense to the labor context, fearing that a broader application 'could effectively

repeal the Hobbs Act.'" *Sturm*, 870 F.2d at 772.[3] As discussed in Part III, *infra*, this apprehension is well founded.

The refusal of a lower court to apply *Enmons* beyond the labor context, because of the negative consequences of doing so, is doctrinally untenable. Until *Enmons* is overruled, *stare decisis* mandates that its interpretation of the Hobbs Act be followed. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law"). An artificial restriction which lacks a textual basis cannot be sustained, irrespective of the validity of the policy justifications supporting it. This Court's recent rejection of two special exceptions to 18 U.S.C. § 1001, which criminalizes making false statements, is dispositive.

In *Brogan v. United States*, 522 U.S. 398 (1998), the "exculpatory no" exception to a false statement, that had been widely adopted by the lower courts, was repudiated because it lacked a basis in the text of the statute. *See id.* at 400-04. The lower courts' policy rationales for the exception were of no avail. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." *Id.* at 408.

In *Hubbard v. United States*, 514 U.S. 695 (1995), this Court refused to adopt the "judicial function exception" that lower courts had invented to limit the negative effects of a statutory interpretation of § 1001 made in *United States v. Bramblett*, 348 U.S. 503 (1955). *Hubbard*, 514 U.S. at 713.

---

[3] Citing *United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979); *accord Zappola*, 677 F.2d at 269; *United States v. Porcaro*, 648 F.2d 753, 760 (1st Cir. 1981); *United States v. French*, 628 F.2d 1069, 1075 (8th Cir. 1980).

"We think the text of [18 U.S.C.] § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception." *Id.*; *see also id.* at 716 (Scalia, J., concurring) (rejecting exception as arbitrary). Rather, the *Hubbard* Court overruled *Bramblett*'s interpretation that the lower courts were attempting to limit. *See* Part IV(A), *infra*.

That lower courts recoil from applying *Enmons* because it would undermine the Hobbs Act is grounds for overruling *Enmons*, not arbitrarily limiting its coverage. *See* Part IV *infra*. However, the subservient role of lower courts prevents those courts from overruling *Enmons*, as only this Court may do so. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions'") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, lower courts only have the option of applying *Enmons* (and its consequences) or arbitrarily limiting it. Faced with this Hobson's choice, the lower courts have simply selected the lesser of two evils.

This Court's status as the nation's highest court exempts it from the hierarchical restrictions that have compelled lower courts to limit *Enmons* to alleviate its negative effects. This Court is empowered to correct flawed previous decisions. *See Patterson v. McLean Credit Union*, 485 U.S. 617, 617-18 (1988) (citing cases where previous statutory interpretations have been overruled). This case confronts the Court with a compelling reason to exercise this power.

III. The Ramifications of Applying *Enmons*' Interpretation of Extortion Under the Hobbs Act Are Unpalatable.

If this Court does not overrule *Enmons*, the principles of *stare decisis* mandate that it be applied to the case at hand. *See Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality") (citing *Rodriguez de Quijas*, 490 U.S. at 494). The disturbing implications of following *Enmons* should give this Court pause.

The lower courts have overwhelmingly recognized that *Enmons* has the potential to undermine the entire extortion prong of the Hobbs Act.[4] If pursuit of a legitimate objective automatically exculpates a defendant, a substantial amount of conduct previously considered extortionate would no longer be. The Hobbs Act's very purpose, which is to prevent interference with interstate commerce, would be almost completely undercut. *See* 18 U.S.C. § 1951(a); *Stirone v. United States*, 361 U.S. 212, 215 (1960).

An illustrative example is *Overnite Transportation Co. v. Teamsters*, 168 F. Supp. 2d 826 (W.D. Tenn. 2001). In *Overnite*, the complaint alleged that the Teamsters were responsible for 221 separate criminal acts, including shooting at truck drivers and dropping cinder blocks on Overnite trucks

---

[4] *See Sturm*, 870 F.2d at 772 ("broader application [of *Enmons*] 'could effectively repeal the Hobbs Act'"); *Cerilli*, 603 F.2d at 419 ("Any application of *Enmons* to cases outside of [the labor] context must be done with caution. Otherwise there is a danger that *Enmons* . . . could effectively repeal the Hobbs Act"); *Russo*, 708 F.2d at 215 (same); *United States v. Debs*, 949 F.2d 199, 200-01 (6th Cir. 1991) (*en banc*); *Porcaro*, 648 F.2d at 760 ("we concur in [the *Cerilli* Court's] reading of *Enmons*"); *French*, 628 F.2d at 1075.

from highway overpasses. *Id.* at 834-35. Over 50 of the acts alleged were found to adequately plead attempted murder. *Id.* at 846. All allegations had to be presumed factually true, as the District Court was addressing a motion to dismiss.

Despite the scope and savagery of the union's campaign, *Enmons* mandated that all of plaintiffs' claims under the Hobbs Act be dismissed because the defendants were ostensibly pursuing legitimate objectives. *Id.* at 842. The *Overnite* court also dismissed plaintiffs' claims under all other extortion provisions that could serve as predicate offenses under the Racketeer Influenced and Corrupt Organization Act, such as the Travel Act and state extortion statutes, because of *Enmons*. *Id.*

Enmons' continuing validity as precedent mandates that the free pass granted to the Teamsters in *Overnite* be extended to *all* other defendants who seek a legitimate objective. Defendants using wrongful means to collect a debt owed, to enforce a lawful contract, or to recover disputed property, would be exempt from the Hobbs Act. As Respondent NOW recognizes, under *Enmons*, "every defendant charged with extortion would claim a rightful purpose, whether political, religious, environmental, moral, or something else." NOW Opp. at 22. It would be difficult for a court to find any ideological objective wrongful, as that requires a value judgment as to the validity of the viewpoint. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"); *cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (government sanction based on viewpoint of speaker contrary to First Amendment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982) (state may not impose civil liability based on affiliation).

Enmons places even the most egregious campaigns of orchestrated violence in pursuit of a legitimate objective safely beyond the Hobbs Act's reach. An environmental extremist group shooting at truck drivers and dropping projectiles on trucks transporting nuclear waste over the nation's highways, in an attempt to compel the trucking company not to transport such waste, would be exempt from federal sanction under *Enmons*. Seeking to limit the use of nuclear energy is a common, legitimate objective.

The sweeping scope of the *Enmons* exemption would subvert the Hobbs Act's purpose, which is to punish anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion." 18 U.S.C. § 1951(a); *see Stirone*, 361 U.S. at 215 (Congress intended to use all of the constitutional power it had to punish interference with interstate commerce). For example, *Overnite* involved a nationwide campaign against a large trucking company. 168 F. Supp. 2d at 832-34. Violence was alleged to have occurred in twenty-one states. *Id.* at 835 n.2. If true, it is an enormous interference with interstate commerce. Yet, *Enmons* exempted it from federal sanction.

IV. *Enmons* Must Be Overruled.

This Court is confronted with the stark choice of applying *Enmons* to this case or overruling *Enmons*. The lower courts' arbitrary restriction on *Enmons*' scope is untenable–the term "wrongful" either applies to the phrase "obtaining of property" in the definition of extortion, or it does not. Until *Enmons* is overruled, *stare decisis* mandates that a wrongful obtaining of property is a prerequisite for extortion under the Hobbs Act. As discussed above, the ramifications of this are unacceptable. Thus, this Court should overrule *Enmons* and return to the plain meaning of the Hobbs Act, under which a wrongful objective is not a prerequisite for extortion.

Stare decisis does not prevent this Court from reconsidering *Enmons*. Under the rationales invoked in *Hubbard v. United States*, 514 U.S. 695 (1995), the lower court jurisprudence contrary to *Enmons* undercuts its claim to *stare decisis*. The lack of a legitimate reliance interest in the decision has the same effect. Since *Enmons* itself is a deeply flawed opinion, this Court should overrule it to avoid the unpalatable consequences of having to apply it to the protesters and all other defendants.

A. *Enmons* Should Be Overruled Under the Rationales Utilized in *Hubbard v. United States.*

In *Hubbard*, this Court confronted a situation identical to the one at bar. *Hubbard* involved 18 U.S.C. § 1001, which criminalizes making false statements in any "department . . . of the United States." The issue was whether the statute applied to false statements made in judicial proceedings. In *United States v. Bramblett,* 348 U.S. 503 (1955), this Court had held that an Article III court is a "department." However, the lower courts subsequently adopted a "judicial function exception," exempting false statements made while a court is performing adjudicative functions. *See Hubbard,* 514 U.S. at 698-99. The judicial function exception was "an obvious attempt to impose limits on *Bramblett's* expansive reading of § 1001." *Id.* at 708. It was also textually incompatible with *Bramblett*, as a court is either a "department," or it is not. *Id.* at 712.

Two different lines of reasoning were utilized in *Hubbard* to reach the same result. Justice Stevens, writing for the plurality, held that the judicial function exception was a competing legal doctrine, and thus *stare decisis* did not necessarily compel allegiance to *Bramblett*. 514 U.S. at 715. A concurrence led by Justice Scalia found that the existence of the judicial function exemption demonstrated the impropriety of *Bramblett*. *Id.* at 716. Both opinions rejected using the judicial function exception to limit *Bramblett*, as it lacked a textual

basis. *Id.* at 713, 716. Ultimately, a six-member majority in *Hubbard* opted to overrule *Bramblett* and return to the plain meaning of § 1001. *Id.* at 715.

The parallels between *Hubbard* and the situation here are compelling. Both involve statutory interpretations by this Court (*Bramblett* and *Enmons*) that lower courts have limited because of the ill consequences of applying them. In both cases, this Court's opinions and the respective lower court jurisprudence limiting those interpretations are incompatible under the statutes' text. Accordingly, use of the rationales employed in *Hubbard* is apt. *Enmons* and the artificial restrictions placed upon it should be overruled, and the plain meaning of extortion under the Hobbs Act reinstated.

(1) Lower Court Jurisprudence Is a Competing Legal Doctrine Entitled to *Stare Decisis* Effect.

The plurality in *Hubbard* found the jurisprudence supporting the judicial function exception to be an "intervening development of the law." 514 U.S. at 713 (quoting *Patterson v. McLean Credit Union,* 491 U.S. 164, 173 (1989)). "[T]he judicial function exception is almost as deeply rooted as *Bramblett* itself." 514 U.S. at 708. "It is thus fair to characterize the judicial function exception as a '*competing* legal doctrin[e]' that can lay a legitimate claim to respect as a settled body of law. Overruling *Bramblett* would preserve the essence of [*stare decisis*] and would, to that extent, promote stability in the law." *Id.* at 713 (emphasis added; citation & footnote omitted).

There is extensive intervening lower court jurisprudence holding that a wrongful objective is not a criterion for extortion under the Hobbs Act. "[I]n an extortion case, a defendant's claim of right to the property is irrelevant. One may be found guilty of extortion even for obtaining one's own property." *United States v. Sturman*, 49 F.3d 1275, 1284 (7th Cir. 1995)

(citing *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991)); *see also Zappola*, 677 F.2d at 269 ("Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, . . . regardless of the defendant's claim of right to the property"). This rule has deep roots in state extortion law. *See State v. Bruce*, 24 Me. 71 (1844).[5] It is also consistent with the plain meaning and legislative history of the Hobbs Act. *See* Part IV(C)(i) *infra*.

Lower courts utilize this doctrine when the statutory construction *Enmons* adopted is not followed.[6] This is the vast majority of the time, as lower courts refuse to apply *Enmons* outside of the labor context.[7] Lower courts have expressly declined to consider an allegedly lawful right to the property

---

[5] A person whose property has been stolen cannot claim the right to punish the thief himself, without process of law, and to force him to compensate him for the loss of his property by maliciously threatening to accuse him of the offense, or to do an injury to his person or property, with intent to extort property from him. *State v. Bruce*, 24 Me. 71 (1844); *see People v. Beggs*, 172 P. 152 (Cal. 1918); *State v. Phillips*, 115 P.2d 418 (Idaho 1941); *Commonwealth v. Coolidge*, 128 Mass. 55 (1880); *In re Sherin*, 130 N.W. 761 (S.D. 1911).

[6] As discussed in Part II *supra*, the refusal of lower courts to follow *Enmons* in all situations is doctrinally untenable.

[7] *See Porcaro*, 648 F.2d at 760 ("We are aware of no case sustaining an *Enmons* defense to a Hobbs Act conviction outside the labor area, and of several that have explicitly declined to do so"); *Russo*, 708 F.2d at 215 ("*Enmons*' exception to the application of the Hobbs Act has been held to be confined to payments gained or sought in furtherance of legitimate *labor* objectives") (emphasis in original; citation omitted); *Terzi*, 2 F. Supp. 2d at 507 ("*Enmons* should be read narrowly to apply only in the employer-employee context"); *Hall Am. Ctr. Assoc. Ltd.*, 726 F. Supp. at 1095 ("*Enmons* . . . has been limited by most courts to the labor context.").

sought in situations involving a collection of a debt owed,[8] a contractual claim between businessmen,[9] a state employee's solicitation of political contributions,[10] and an Indian nation's property claim against a railroad.[11] Even within the collective bargaining context, use of *Enmons* is sharply limited.[12]

---

[8] *See United States v. Zappola*, 523 F. Supp. 362, 368 (S.D.N.Y. 1981) ("you cannot beat someone up to collect a debt, even if you believe he owes it to you"), *aff'd*, 677 F.2d 264 (2d Cir. 1982); *see also French*, 628 F.2d at 1075 (*Enmons* does not protect extortion to collect a debt, as it does not apply to "other kinds of 'wrongful' taking of money to which the extortioner may also have a rightful claim").

[9] *Porcaro*, 648 F.2d at 760 ("no basis for extending *Enmons* to . . . use of force and threats to resolve a contractual dispute among businessmen").

[10] *Cerilli*, 603 F.2d at 419.

[11] *United States v. Warledo*, 557 F.2d 721, 730 (10th Cir. 1977).

[12] "Even within the labor context, some courts . . . have been reluctant to extend *Enmons* to union activities beyond the scope of traditional employer-employee labor disputes." *Terzi*, 2 F. Supp. 2d at 505 (citing *United States v. Debs*, 949 F.2d 199, 200 (6th Cir. 1991) (*Enmons* does not apply to violence incident to union election campaign)); *see United States v. Jones*, 766 F.2d 994, 1002-03 (6th Cir. 1985) (doubting whether *Enmons* covers use of violence to persuade employees of non-union employer to join union); *United States v. Stofsky*, 409 F. Supp. 609, 616 (S.D.N.Y. 1973) (doubting whether *Enmons* applies to force used against neutral, non-union employer, as "it must be recognized that *Enmons* deals specifically with employer-employee disputes"); *United States v. Quinn*, 514 F.2d 1250, 1259-60 (5th Cir. 1975) (violent labor picketing not protected by *Enmons* when defendant "was never authorized by [the company's] employees to represent them"); *Domestic Linen Supply & Laundry Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 722 F. Supp. 1472 (E.D. Mich. 1989) (*Enmons* does not protect violence incident to union's objective to include supervisors in the collective bargaining unit).

However, this doctrine and *Enmons* are mutually incompatible within the text of the Hobbs Act. *Enmons* mandates that the term "wrongful" modify the phrase "obtaining of property," in the definition of extortion. *See* Parts I and II(A) *supra*. The jurisprudence that does not take into consideration the legitimacy of the objective requires that the term "wrongful" *not* apply to the phrase "obtaining of property." Because the text of a statute can only be read one way, the doctrines are irreconcilable and cannot coexist.

Because both doctrines are established precedent, *stare decisis* supports retaining either. *See Hubbard*, 514 U.S. at 712 (considerations of *stare decisis* "point in two conflicting directions"). Accordingly, overruling *Enmons* and adopting the plain meaning of the Hobbs Act–in which a wrongful obtaining of property is not a prerequisite–does not infringe upon the sanctity of *stare decisis*, as it supports an equally deep line of jurisprudence.

(2) Refusal of Lower Courts to Follow *Enmons* for Fear That It Undermines the Hobbs Act Demonstrates Its Impropriety.

Justices Scalia's and Kennedy's concurrence in *Hubbard* held that the existence of the judicial function exemption demonstrated *Bramblett* to be erroneous:

> [T]he significance I find in the fact that so many Courts of Appeals have strained so mightily to discern an exception that the statute does not contain . . . demonstrates how great a potential for mischief federal judges have discovered in the mistaken reading of 18 U.S.C. § 1001, a potential we did not fully appreciate when *Bramblett* was decided.

514 U.S. at 716 (Scalia, J., concurring in part and concurring in judgment).

Federal appellate and district courts have literally restricted *Enmons* to its facts.[13] Their refusal to follow *Enmons*' construction of the Hobbs Act is compelling evidence of its impropriety. Generally, any statutory interpretation that cannot be applied, lest it undermine the statute itself, is inherently flawed. Here, the lower courts have expressly stated that their refusal to utilize *Enmons* is due to the legitimate fear that it "could effectively repeal the Hobbs Act." *See* cases cited n.4 *supra*; *see also* Part III *supra*. The lower courts have all but proclaimed *Enmons* unfit to be utilized as precedent.

Enmons' flawed nature is grounds for overruling the decision–not artificially limiting its application with restrictions foreign to the statute's text. In *Hubbard*, the concurrence found that "*Bramblett*['s] . . . unacceptable consequences . . . can be judicially avoided (absent overruling) only by limiting *Bramblett* in a manner that is irrational or by importing exceptions with no basis in law." 514 U.S. at 716. This counseled overruling *Bramblett*, as importing exceptions cut from whole cloth is "much more arbitrary than simply overruling a wrongly decided case." *Id.* at 717; *see also Brogan*, 522 U.S. at 406-07 (rejecting as arbitrary the importing of case-by-case exceptions into criminal statutes).

Similarly, limiting *Enmons'* construction of the definition of extortion, as the lower courts have done, is unsupportable under the Hobbs Act's text and legislative history. *See* Part II

---

[13] *See United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991) ("*Enmons* has not been extended beyond its own facts"); *United States v. Jones*, 766 F.2d 994, 998 (6th Cir. 1985) ("Subsequent decisions of various courts of appeals have refrained from extending the rationale of *Enmons* beyond the facts of that case") (citations omitted); *Castor*, 937 F.2d at 299 ("Several courts have expressed the view that *Enmons* should be limited to its facts, specifically cases of obtaining property by force, threat or use of fear in the context of a labor dispute") (citations omitted).

supra. In fact, the primary reason lower courts have refused to apply *Enmons*–that it could subvert the Hobbs Act–is actually the most compelling justification for overruling the decision. Thus, *Enmons* should be overruled.

B. *Enmons* Is a "Seriously Flawed Opinion."

A prerequisite to overruling any decision is that it be erroneous. In *Hubbard*, the Court recognized that *Bramblett* was a "seriously flawed opinion" because it failed to follow the plain language of the statute, and because of misreading of legislative history. 514 U.S. at 702. Similarly, *Enmons* misconstrued the Hobbs Act's plain language and turned legislative history on its head.

(1) *Enmons* Is Contrary to the Plain Language of the Hobbs Act.

Enmons' consideration of the legitimacy of the objective sought by a defendant is contrary to the statute's plain meaning. "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The plain meaning of this language is that the term "wrongful" modifies only the "use of . . . [methods listed]." The words "induced by" immediately preceding the phrase "wrongful use of" make this clear. Thus, extortion under the Hobbs Act requires only wrongful *means*, not a wrongful *end*.

Enmons' construction is grammatically impossible. The adjective "wrongful" simply cannot reach back to modify

"obtaining of property." In fact, under the last antecedent rule,[14] the entire clause–"induced by wrongful use of . . . [methods listed]"–modifies only the phrase "with his consent," not the "obtaining of property" phrase.

The *Enmons* majority relied heavily on the proposition that applying the term "wrongful" to only the methods listed would render the adjective superfluous. 410 U.S. at 399-400. This concern is unfounded, as the term "wrongful" does add to the meaning of the methods listed. An entire field of jurisprudence details when use of "fear" is wrongful or legitimate, particularly economic fear.[15] Neither is obtaining property "under color of official right" inherently wrongful.[16] In regards to force, passive resistance, such as a sit-in or chaining oneself to a tree, is not necessarily wrongful. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) (resistance to police

---

[14] Under the last antecedent canon, modifying phrases and clauses in a statute are to be applied only to the word or phrase immediately preceding (*i.e.*, the last antecedent), and not to others more remote. *See Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 482 (D.C. Cir. 2001); *Bell v. Reno*, 218 F.3d 86, 91 (2d Cir. 2000).

[15] *See Clemente*, 640 F.2d at 1077 ("fear of economic loss is not an inherently wrongful means"); *see also Sturm*, 870 F.2d at 773 ("We therefore hold that for purposes of the Hobbs Act, the use of legitimate economic threats to obtain property is wrongful only if the defendant has no claim of right to that property"(footnote omitted)); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 503 (3d Cir. 1998); *Viacom Int'l, Inc. v. Icahn*, 747 F. Supp. at 210-11; 4 A.L.R. Fed. 881 (1970), § 6(b) (collecting cases).

[16] *See McCormick v. United States*, 500 U.S. 257, 271 (1991) (receipt of campaign contributions because of office not illegal without *quid pro quo*); *United States v. Snyder*, 930 F.2d 1090, 1093 (5th Cir. 1991) ("color of official right means the wrongful taking by a public officer of money or property not due to the officer or the office").

efforts to clear abortion protestors from health clinic is not a "'wrongful use of actual or threatened force, violence or fear,'" 18 U.S.C. § 1951(b)). Nor would threatening use of civil disobedience be inherently wrongful. Only actual use of violence would seem inherently wrongful in the context of the Hobbs Act.

(2) Legislative History Does Not Support *Enmons*.

Enmons relied on the legislative evolution of the Hobbs Act for the proposition that Congress did not consider seeking legitimate labor ends a wrongful obtaining of property meant to be proscribed by the Act. *See* 410 U.S. at 401-07. This conclusion is inconsistent with the Hobbs Act's history, congressional intent, and the rulings of this Court.

Congress enacted the Hobbs Act's current incarnation in direct response to *United States v. Local 807, Teamsters*, 315 U.S. 521 (1942). In *Local 807*, this Court exempted a Teamster highwayman scheme from prosecution on the basis of an exemption in § 2 of the Anti-Racketeering Act of 1934, 48 Stat. 979, for the "'payment of wages by a bona-fide employer to a bona-fide employee.'" *Enmons*, 410 U.S. at 401-03 (footnote omitted). Congress' primary purpose in passing the Hobbs Act was eliminating that exemption. *United States v. Green*, 350 U.S. 415, 419 n.5 (1956). Nevertheless, the *Enmons* majority utilized a handful of statements from the House floor to effectively read the exemption right back into the Act. *See* 410 U.S. at 403-08.[17]

---

[17] The dissent in *Enmons* accurately points out that most of the legislative history relied on by the majority was from the 78th Congress, not the differently constituted 79th Congress that enacted the Hobbs Act. 410 U.S. at 414 (Douglas, J., dissenting).

Enmons' counter-intuitive conclusion that Congress, while removing organized labor's explicit textual exemption from the Hobbs Act, intended to exempt violent union campaigns from its auspices, is "unsound" at best. *Cf. Hubbard*, 514 U.S. at 705.[18] In *Green*, this Court recognized that "[t]he legislative history makes clear that the [Hobbs] Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship. The words were defined to avoid any misunderstanding." 350 U.S. at 419 (footnote omitted). A vigorous dissent in *Enmons*, by four Justices, reached the same conclusion. 410 U.S. at 414-17 (Douglas, J., dissenting) (citing extensive legislative history).

Moreover, the startling moral implications of the intent *Enmons* subscribes to Congress cast serious doubt on the analysis. An unblinking analysis by the district court in *Overnite Transportation Co. v. Teamsters*, 168 F. Supp. 2d 826 (W.D. Tenn. 2001), concluded:

> The Supreme Court [in *Enmons*] recognized that violence, property damage, and extortion often went hand-in-hand with "lawful" strikes and was willing to exempt such conduct from the debilitating penalties of tough federal laws. In essence, the Supreme Court impliedly recognized the unique circumstances of labor disputes, and the reality that extortion is an integral part of the labor landscape.

Id. at 842. Can it be seriously contended that Congress considered violence a legitimate means of obtaining an objective, much less "an integral part of the labor landscape"?

---

[18] As in *Enmons*, the *Bramblett* Court carried forward features from a predecessor statute that Congress had excised when it enacted the current version of the statute. 514 U.S. at 705-07. The *Hubbard* Court recognized this reasoning as "unsound," *id.* at 705, and a "historical misapprehension," *id.* at 708.

That proposition is not only shocking, but contrary to this Court's opinion in *Green*. There the Court said:

> There is nothing in [the Clayton Act, Norris LaGuardia Act, Railway Labor Act, or National Labor Relations Act] . . . that indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. *Those are not legitimate means for improving labor conditions.*

350 U.S. at 419-20 (emphasis added; footnote omitted); *see id.* at 420 n.7 (collecting cases). Yet, *Enmons* requires that Congress be attributed the motive described in *Overnite*.

Contrary to *Enmons*, Congress actually intended "'to prevent *anyone* from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion *as defined in the bill*.'" *United States v. Culbert*, 435 U.S. 371, 377-78 (1978) (quoting H.R. 238, 79th Cong., 1st Sess., 9 (1945)) (partial emphasis added). "The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Stirone*, 361 U.S. at 215. Exemptions for particular groups or industries were not intended.[19]

Moreover, New York state extortion law, upon which the Hobbs Act is based, recognized that a lawful claim to property sought through illegitimate means is not a defense for extortion. *See United States v. Pignatelli*, 125 F.2d 643, 647 (2d Cir. 1942); *see also People v. Fichtner*, 114 N.E.2d 212 (N.Y.

---

[19] *See United States v. Hoelker*, 765 F.2d 1422, 1424-25 (9th Cir. 1985) (insurance industry not exempt); *United States v. Gill*, 490 F.2d 233, 237 (7th Cir. 1973) (liquor industry not exempt).

1953). This view was also widely accepted in other states when the Hobbs Act was enacted. *See* n.5 *supra*.

However, the most egregious error committed by the *Enmons* majority was utilizing legislative history to avoid the Hobbs Act's plain meaning. "Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress . . . ." *Hubbard*, 514 U.S. at 708; *see also id.* at 702-03 ("a historical analysis normally provides less guidance to a statute's meaning than its final text"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"). The conclusions the *Enmons* majority drew from legislative history cannot be squared with the Hobbs Act's text. The statute's plain meaning precludes consideration of whether a defendant is seeking a legitimate objective, as the term "wrongful" simply does not modify the phrase "obtaining of property."

C. *Stare Decisis* Is Undermined by Lack of a Reliance Interest in *Enmons*.

"*Stare decisis* is a 'principle of policy,' and not 'an inexorable command.'" *United States v. International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citations omitted). Reliance is one of these policies, as overruling a previous decision has the potential to "'dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard*, 514 U.S. at 714 (quoting in part *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991)). In *Hubbard*, "the absence of significant reliance interests in adhering to *Bramblett*" was a key factor in overruling the latter case. *Hubbard*, 514 U.S. at 713. Similarly, the lack of legitimate reliance on *Enmons* undercuts its claim to *stare decisis*.

There is not, and cannot be, a reliance interest in *Enmons*. *Enmons*' practical effect is to excuse campaigns of force and violence, otherwise actionable under the Hobbs Act, from liability because of their ostensibly legitimate objectives. Only persons who orchestrate violent or threatening undertakings can possibly rely on the shelter *Enmons* provides. Providing refuge for scoundrels is not a legitimate reliance interest. *See id.* at 717 (Scalia, J., concurring) ("Those whose reliance on *Bramblett* induced them to tell the truth to Congress or the courts, instead of lying, have no claim on our solicitude") .

Overruling *Enmons* would not expose legitimate means of applying pressure, such as lawful picketing or political demonstrations, to liability under the Hobbs Act.[20] Such tactics, if nonviolent, could only constitute "fear" under the Hobbs Act. Use of fear, particularly economic fear, is not "wrongful" in a variety of circumstances. *See* n.15 *supra*.

Thus, a typical labor strike, boycott, or political demonstration will not be sanctionable under the Hobbs Act if *Enmons* is overruled. Only campaigns that utilize illegitimate means, such as violence, will fall under its auspices. Force and violence are not legitimate methods to obtain any objective in a civil society, including union goals. *See Green,* 350 U.S. at 420 ("[threats of force or violence] are not legitimate means for improving labor conditions"); *id.* at 420 n.7 (collecting cases). In fact, the Hobbs Act's very purpose is to punish such behavior when it interferes with interstate commerce. *See Stirone*, 361 U.S. at 215.

---

[20] In *Enmons*, the majority mistakenly feared such a result: "The Government's broad concept of extortion . . . would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce." 410 U.S. at 410.

D. *Enmons*' Ramifications Justify Overruling It.

Finally, the most compelling justification for overruling *Enmons* is the negative ramifications of not doing so. As recognized by the lower courts and demonstrated in Part III *supra*, the consequences of allowing a legitimate objective to automatically exempt a defendant from the Hobbs Act would be catastrophic for both the Act and the interests it protects. Since *Enmons* is a textual interpretation that cannot rationally be limited to its facts, this Court must overrule *Enmons* to avoid its odious ramifications.

CONCLUSION

For the reasons articulated in this brief, *Enmons*' construction of the Hobbs Act either must be applied to the protesters or overruled. Although *Amicus Curiae* National Right to Work Legal Defense Foundation takes no position regarding whether the opinion of the United States Court of Appeals for the Seventh Circuit should be affirmed or reversed, *amicus* does

seek equal application of the law. *Amicus* respectfully urges that this Court overrule *Enmons*.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.*
William L. Messenger
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 3218510

COUNSEL FOR *AMICUS*
**Counsel of Record*

July 2002

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

Nos. 01-1118 and 01-1119

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

NIKOLAS T. NIKAS
DENISE M. BURKE
(Counsel of Record)
DORINDA C. BORDLEE
AMERICANS UNITED FOR LIFE
310 South Peoria Street
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

July 12, 2002

*Noted for purpose of identification only

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pgs

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. This Court's Decision In *Evans v. United States* Compels The Conclusion That Hobbs Act Extortion Requires "Obtaining" Of Property	3
II. Lower Courts Have Improperly Abolished The Requisite Element Of "Obtaining"	5
III. Cases Involving Anti-Abortion Protesters Further Erode The Common Law Requirement Of An "Obtaining"	9
IV. Without Analysis, The Court Below Disregarded The "Obtaining" Element By Implicitly Adopting Flawed "Loss To The Victim" Reasoning	16
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Commonwealth v. Pease, 16 Mass. 91 (1819) 6

Evans v. United States, 504 U.S. 255 (1992) 3, 4, 5, 17

Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) 10, 12

Morissette v. United States, 342 U.S. 246 (1952) 4

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 14

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989) 10, 11, 12

NOW v. Scheidler, ___ F.Supp. ___, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill., July 16, 1999) 14

NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 16

Palmetto State Medical Center v. Operation Life Line, 117 F.3d 142 (4th Cir. 1997) 10, 12

People v. Fichtner, 118 N.Y.S.2d 392 (N.Y. App. Div. 1952) 7, 8

People v. Scheppa, 67 N.E.2d 581 (N.Y. 1946) 7

Printers II, Inc. v. Professionals Pub. Inc., 615 F.Supp. 767 (S.D.N.Y. 1985), *aff'd on other grounds*, 784 F.2d 141 (2d Cir.1986) 4

Rex v. Burdett, 91 Eng. Rep. 996 (K.B. 1696) 6

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 11

United States v. Arena, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000) 10, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) 11

United States v. Enmons, 410 U.S. 396 (1973) 4, 6

United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) 9

United States v. Green, 350 U.S. 415 (1956) 5, 6, 12

United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) 9

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) 8, 9, 16, 17

United States v. Nardello, 393 U.S. 286 (1969) 6

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001) 6

United States v. Provenzano, 334 F.2d 678 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964) 6, 7,.8, 9

United States v. Rindone, 631 F.2d 491 (7th Cir. 1980) 8, 9

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) 8, 9

United States v. Stillo, 57 F. 3d 553 (7th Cir. 1995), *cert. denied*, 516 U.S. 945 (1995) 8, 9, 16

Viacom Int'l, Inc. v. Icahn, 747 F.Supp. 205 (S.D.N.Y. 1990), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Commissioners of the Code, Proposed Penal Code of the State of New York, § 613 (1865) 4

N.Y. Penal Law § 850 (1909) 4

18 U.S.C. § 1961-64 (2000) 2

18 U.S.C. § 1951 (2000) 2, 4

OTHER AUTHORITIES

G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345 (1996) 13, 14

Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 631 (1999) 6, 7, 12

INTEREST OF AMICUS[1]

Americans United for Life (AUL)[2] is a national, non-profit public interest legal and educational organization that advocates, among other things, that the practice of human abortion harms the physical and social well-being of women, ends the life of unborn children, and contradicts the highest moral standards of American life.

While working primarily in the courts, legislatures and outlets of public education and media, AUL believes that free, open and robust public social debate on the issue of abortion must be allowed unimpeded by fear of meritless and costly litigation and the threat of draconian damage awards.

If left standing, respondents' flawed contention, that racketeering liability predicated on Hobbs Act[3] extortion, may be imposed on social protests that merely cause a "loss" to an object of the protest, without a concurrent "obtaining" by a protester or third party, will virtually shut down all public debate, including legitimate protected speech, on the most crucial social issue of our generation.

Because stifling free and vigorous public protest on the merits of legalized abortion undercuts and hinders

---

[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court.

[2] Attorneys from Americans United for Life (not the undersigned) and Professor G. Robert Blakey have previously represented the petitioners in this litigation. Further, the Alliance Defense Fund (ADF), a non-profit public interest organization, located in Scottsdale, Arizona, partially funded the preparation of this brief.

[3] *See* 18 U.S.C. § 1951 (2000).

public opposition to abortion, AUL's efforts to promote public policy that defends human life by impacting the broader culture are at the very least indirectly and adversely affected. Consequently, AUL files this amicus brief in support of petitioners, urging that the lower courts' improper application of the Hobbs Act be reversed.

SUMMARY OF ARGUMENT

The respondents' theory of recovery under the Racketeer Influenced and Corrupt Organizations Act (RICO)[4] – that their mere loss of property is equivalent to petitioners obtaining it – rests on an interpretation of Hobbs Act extortion that is contrary to the express language of 18 U.S.C. § 1951, inconsistent with this Court's precedent, and contrary to common law. Respondents' interpretation and some lower courts, including the decisions below, have abolished the "obtaining" element of Hobbs Act extortion, or have essentially abolished it by replacing it with novel meanings.

The abolishment of the "obtaining" element of Hobbs Act extortion is based on a theory that takes correct legal propositions – that an extortionist need not personally benefit from the extortion, and that the extorted property need not be tangible – and mistakenly links them with an erroneous proposition – that the gravamen of extortion is loss to the victim. Some courts have used this erroneous theory to hold defendants liable under the Hobbs Act when the defendants have not obtained, attempted to obtain, or

[4] *See* 18 U.S.C. § 1961-64 (2000).

conspired to obtain property. Curiously, these decisions arise in only one unique context: when the plaintiffs or victims are abortion clinics, abortion providers, or abortion advocates, as in this case.

Simply depriving respondents of property, or the use of property, does not equate with the defendants' obtaining of that property. Since petitioners or their designees never "obtained" property, tangible or intangible, no violation of the Hobbs Act occurred and, therefore, no violation of RICO occurred. Respondents and others similarly situated have adequate remedies for private harms, including trespass and vandalism, available to them under state law.

ARGUMENT

I. THIS COURT'S DECISION IN *EVANS V. UNITED STATES* COMPELS THE CONCLUSION THAT HOBBS ACT EXTORTION REQUIRES "OBTAINING" OF PROPERTY

This Court confirmed the basic principles of statutory construction in *Evans v. United States*, 504 U.S. 255 (1992), where this Court agreed that "extortion" under the Hobbs Act must be interpreted in light of its common law meaning. Recognizing that Congress "intended to adopt" the common law meaning of extortion in the Hobbs Act, this Court confirmed:

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will

> convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 259-60 (*quoting Morissette v. United States*, 342 U.S. 246, 263 (1952)).

This Court also acknowledged that Congress adopted its particular definition of the Hobbs Act from New York law and the Field Code, the forerunner to New York law, both of which defined extortion as "the obtaining of property from another . . ." *See Evans*, 504 U.S. at 263 n.9. Under New York Law, "[l]arceny by extortion requires the taking of property." *Printers II, Inc. v. Professionals Pub. Inc.*, 615 F.Supp. 767, 773 (S.D.N.Y. 1985), *aff'd on other grounds*, 784 F.2d 141 (2d Cir. 1986); *see also United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (*quoting* New York law[5] which included the "obtaining" element); *Viacom Int'l, Inc. v. Icahn*, 747 F.Supp. 205, 210 (S.D.N.Y. 1990) (*quoting* 18 U.S.C. § 1951) (definition of extortion includes obtaining), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992). The Field Code of 1865 defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Evans*, 504 U.S. at 263 n.9 (*citing* Commissioners of the Code, Proposed Penal Code of the State of New York, § 613 (1865)).

[5] N.Y. Penal Law § 850 (1909).

By statute, Congress has expanded the early meaning of common law "extortion" to include the actions of private parties (i.e., not just actions under color of official right). *Id.* at 261. But Congress retained the universal common law meaning of "extortion" as an offense that involves a **taking** or **obtaining** of property. *Id.* at 260-61. There is no basis for a finding to the contrary.

II. LOWER COURTS HAVE IMPROPERLY ABOLISHED THE REQUISITE ELEMENT OF "OBTAINING"

Disregarding the plain language of the Hobbs Act, the common law, and *Evans*, some lower courts have abolished the element of "obtaining," or have essentially abolished it by replacing it with novel meanings.[6] Many courts have misconstrued *United States v. Green*, 350 U.S. 415, 420 (1956), where this Court said "extortion as defined in the statute in no way depends upon having a **direct** benefit conferred on the person who **obtains** the property." (emphasis added). In *Green*, this Court addressed the validity of an indictment of a union official whose threats served to obtain money and jobs for employees. *Id.* at 417. This Court in no way suggested that obtaining is not an element of Hobbs Act extortion; rather, it simply concluded that a defendant who obtains or attempts to obtain property for the benefit of a third party falls within the scope of

[6] For example, in this case, the district court judge instructed the jury that the "obtaining property" element of the Hobbs Act was satisfied by a showing that petitioners (or others associated with Pro-Life Action Network (PLAN)) "caused women, clinic doctors, nurses, or other staff or the clinics themselves to **give up** a property right" where "property right means **anything of value**, including a woman's right to seek services from a clinic." (Tr. 4945).

Hobbs Act extortion. *Id.* at 420. Nonetheless, a number of courts have misconstrued *Green* to mean that a defendant need not "obtain" or "attempt to obtain" property **for anyone** under the Hobbs Act.

In an early and seminal example of this error, after quoting extensively from *Green*, the court in *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964), improperly stated that "the gravamen of the offense [of extortion] is loss to the victim." This is manifestly false. The essence of extortion is the **acquisition** of another's property. *Enmons*, 410 U.S. at 400, 406 n.16 (1973); *United States v. Nardello*, 393 U.S. 286, 289-90, 295-96 (1969). *Accord*, *Rex v. Burdett*, 91 Eng. Rep. 996, 997 (K.B. 1696) ("the extorsive agreement . . . is not the offence, but the taking . . . ."); *Commonwealth v. Pease*, 16 Mass. 91, 93-94 (1819) ("the essence of the offence . . . is the receiving"); *United States v. Panaro*, 266 F.3d 939, 943 (9th Cir. 2001) ("[U]nder the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived.").

The *Provenzano* court mistakenly linked an accepted legal proposition – that an extortionist need not personally benefit from the extortion – with an erroneous one – that the gravamen of extortion is loss to the victim.[7] Not only is

[7] *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 717-19 (1999).

the *Provenzano* assertion that the "gravamen of the offense" is "loss to the victim" false, it is also mere dictum.[8] A careful review of the actual holding in *Provenzano* supports the proper understanding that for extortion to be committed, someone **must actually obtain** property, although the property need not constitute a gain to the defendant.[9] Furthermore, the *Provenzano* court inappropriately fashioned the "loss to the victim" dictum from a portion of a jury instruction in a New York state criminal case, *People v. Fichtner*, 118 N.Y.S.2d 392, 395 (N.Y. App. Div. 1952). The propagation of the "loss to the victim" dictum is a clear misreading of *Fichtner*, a case which teaches that to be convicted of extortion, property must be "collect[ed]" (*i.e.*, obtained), but need not be retained by the defendant.[10] Unfortunately, a number of

[8] Specifically, the court's holding was "that it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. **It is enough that payments were made at the extortioner's direction to a person named by him.**" *Provenzano*, 334 F.2d at 686 (emphasis added). Clearly, the court expressly recognized that property must be "obtained" by someone for "extortion" to have occurred. Moreover, following accepted principles of statutory construction, the *Provenzano* court relied on two New York state court decisions that affirmed convictions for extortion where a third party, not the extortioner, "obtained" money from the victim. *See People v. Fichtner*, 118 N.Y.S.2d 392 (N.Y. App. Div. 1952) (affirming convictions of two store clerks who extorted $25 from a customer and gave the money to their employer); *People v. Scheppa*, 67 N.E.2d 581 (N.Y. 1946) (affirming conviction for extortion where money was turned over to alleged co-actor).

[9] *See* Murray, *supra* note 7, at 718.

[10] In *Fichtner*, the defendants were convicted of extorting $25 from a customer by threatening to charge him with shoplifting. The money was collected from the customer, rung up on the cash register and placed into company funds. The defendants did not retain any of the

(Continued on following page)

courts,[11] including the Seventh Circuit,[12] have cited, relied on, and adopted the *Provenzano* court's flawed dictum.

Importantly, in each case adopting this dictum, the defendant in fact "obtained" property, attempted "to obtain" property, conspired "to obtain" property, or "obtained" property to be directed to a third party. *See United*

---

money. At trial, the defendants argued that they were not guilty of extortion since they had not gained any benefit by their actions and that they had reasonably believed that the victim had stolen goods worth $25 from the store. The trial court charged, in part, that "it is immaterial that the person who obtains the money retains no part of the proceeds; the gist of the crime is the loss of money by [the victim] by reason of a criminal act on the part of the defendants." *Id.* at 395 (emphasis added). The defendants were convicted and their convictions were upheld on appeal. While affirming that extortion does not require a defendant to retain property he obtained by extortion, the appellate court implicitly rejected the portion of the jury charge that stated that "the gist of the crime is the loss of money by [the victim]." Rather than finding that extortion statutes were intended to prevent a loss to the victim, the court specifically found that "the extortion statutes were intended to prevent the **collection of money**." *Id.* at 395-96. (emphasis added). The "collection" of money is obviously tantamount to "obtaining" it.

[11] *See, e.g., United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (*quoting Frazier*, 560 F.2d at 887), *cert. denied*, 440 U.S. 910 (1979).

[12] In *United States v. Rindone*, the Seventh Circuit stated that "a [Hobbs Act] violation is complete when one attempts to induce a victim engaged in interstate commerce to part with property." 631 F.2d 491, 493 (7th Cir. 1980) (*citing, inter alia, Frazier*, 560 F.2d at 887). *See also United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) ("loss to the victim is the gravamen of the offense"), *cert. denied*, 479 U.S. 1093 (1987); *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995) ("[a] loss to, or interference with the rights of, the victim is all that is required [for a Hobbs Act violation]") (*citing United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986)), *cert. denied*, 479 U.S. 1093 (1987).

States v. Provenzano, 334 F.2d 678, 684-86 (3d Cir. 1964) (defendant directed payments to a third party); *United States v. Hyde*, 448 F.2d 815, 820 (5th Cir. 1971) ("defendants threatened certain small loan companies that unless pay-offs were made to them they . . . would put the companies out of business"); *United States v. Frazier*, 560 F.2d 884, 885 (8th Cir. 1977) (defendant was convicted of attempting "to obtain money from the First National Bank"); *United States v. Santoni*, 585 F.2d 667, 670 (4th Cir. 1978) (defendant received payoffs in order to secure subcontracts for a third party); *United States v. Rindone*, 631 F.2d 491, 492 (7th Cir. 1980) (defendant accepted payoffs for granting electrical work permits); *United States v. Lewis*, 797 F.2d 358, 363 (7th Cir. 1986) (defendant demanded that victim wire $1 million to a third party's bank account);[13] *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995) (testimony given that defendant received a cash payment).

III. CASES INVOLVING ANTI-ABORTION PROTESTERS FURTHER ERODE THE COMMON LAW REQUIREMENT OF AN "OBTAINING"

Relying on *Provenzano* and its progeny, lower courts have continued to erode and distort the statutory and

---

[13] Evidence of a demand to obtain property is sufficient proof to sustain conviction for attempted extortion. *See Rindone*, 631 F.2d at 493 ("sufficient evidence to prove an attempt to extort has been found even where the payment demand was made but the victim refused to comply"). Here the record contains no evidence of the petitioners' demanding any payments or property of any type or nature.

common law definition of extortion, specifically by undermining the requirement of an "obtaining" of property. Some courts have actually held defendants liable under the Hobbs Act when the defendants have not obtained, attempted to obtain, or conspired to obtain property. Curiously, these cases thus far arise in only one unique context: when the plaintiffs or victims are abortion clinics, abortion providers, or abortion advocates,[14] as in this case.

This greatly expanded and flawed theory of liability was first adopted in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), where anti-abortion protesters were found liable under civil RICO. This decision was wrong. In finding the defendants liable under the Hobbs Act and subsequently under RICO, the court failed to determine whether the defendants had "obtained" anything through their actions,[15] blatantly ignoring the express statutory language for extortion and the common law history of the term. Inexplicably, despite

[14] *See, e.g., Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142 (4th Cir. 1997).

[15] The defendants picketed the Northeast Women's Center in Philadelphia, tried to block access to the facility, and attempted to dissuade patients from entering the facility. They also chanted, leafletted, and demonstrated in public fora, activities clearly protected under the First Amendment. After nine years of protests, the facility lost its lease and moved to a second location where the protests continued. *McMonagle*, 868 F.2d at 1345-46. To meet their burden at trial, the facility introduced evidence of protected First Amendment conduct and four instances of trespass. *Id.* at 1346-47 They also introduced evidence that the protesters had picketed the homes of three facility employees, causing two of the employees to quit. *Id.* at 1346.

acknowledging that RICO "was being applied in contexts far beyond those originally intended,"[16] the court neglected to address directly the "obtaining" element of extortion, even though it was argued by the defense.[17] Instead, the court reiterated that "economic motive" was not a required element for a Hobbs Act violation, a conclusion that was irrelevant and unresponsive to the defendants' argument.[18] Thus, the court clearly confused the defendants' argument that they had not "obtained" any property as a result of their activities with the argument that the defendants had no "economic motive" for their protests.[19]

A careful analysis of the court's reasoning in *McMonagle* does not support its assertion that Hobbs Act extortion requires only a deprivation to the victim, rather than a deprivation and a corresponding "obtaining" or "taking" by the defendant or a related third party.[20] The court's observation, that "a person may violate the Hobbs Act without himself receiving the benefits of his coercive actions,"[21] was inadequate: while the extortionist need not

[16] *Id.* at 1348 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985)).

[17] *See* Murray, *supra* note 7, at 726 n. 157.

[18] *McMonagle*, 868 F.2d at 1350.

[19] Interestingly, the issue of "economic motive" was never raised at trial. However, the Third Circuit, confusing the issue of "obtaining" with "economic motive," asserted that the issue of "economic motive" had been raised on appeal. *McMonagle*, 868 F.2d at 1349-50; *see also* Murray, *supra* note 7, at 726.

[20] *See* Murray, *supra* note 7 at 727.

[21] *McMonagle*, 868 F.2d at 1350 (*citing United States v. Cerilli*, 603 F.2d 415, 420 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980)).

personally receive the benefits of his actions, those benefits must accrue, at least, to the extortionist's designee.[22] In affirming the lower court, the *McMonagle* court did not scrutinize the common law elements of extortion[23] and, without citation to persuasive authority or careful analysis, failed to require an "obtaining" of property by **someone** before holding that extortion occurred.[24]

Relying on *McMonagle* and its flawed analysis, the Second Circuit affirmed the Hobbs Act convictions of two

[22] *See Green*, 350 U.S. at 420.

[23] *See* Murray, *supra* note 7, at 727.

[24] The Third Circuit is not alone in this failure, although it arguably precipitated this lack of meaningful analysis by the lower courts. In *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995), the court, simply citing *McMonagle*, 868 F.2d at 1350, and conducting no meaningful analysis, concluded,

> [T]he record clearly shows that [the defendants] used force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinics from conducting their normal, lawful activities. The record also amply shows that [the defendants'] tactics include the intentional infliction of property damage, and directly result in the clinics' loss of business. **It is difficult to conceive a set of facts that more clearly sets forth extortion as it is defined [under the Hobbs Act].**

The *Libertad* court, in its opinion, never explained or addressed the "obtaining" requirement. Moreover, nothing in the record of the case indicated that the defendants "obtained" anything of which their victims were deprived. *See* Murray, *supra* note 7, at 732. Similarly, in *Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142, 149 (4th Cir. 1997), the court, in reversing the lower court's finding of liability because of insufficient evidence, never questioned whether the Hobbs Act and RICO were properly applied to abortion protesters who never "obtained" property of which the plaintiff was purportedly "deprived."

abortion protesters who conspired to damage two abortion clinics with butyric acid.[25] In neither instance did the defendants obtain property. The court erroneously concluded that because "property may be tangible or intangible," the defendants obtained property when they "induce[d] abandonment of that [intangible property] right."[26] But this argument is a *non sequitur*. Simply because property is intangible does not mean that petitioners "obtain" such property even if another loses it.

Logically, if the petitioners in this case **obtained** property from the respondents, the respondents have necessarily lost their property. But the converse is not true. Just because the respondents have lost property does not mean that the petitioners "obtained" it. If that were so, any vandalism would also qualify as larceny or theft. Petitioners' vigorous protest, which sometimes may have included the commission of a tort – a trespass – by activists, is not extortion. Petitioners' protest, like much other political expressive conduct, may, in some respects, be coercive, but **it is not extortive**.[27] And to the extent that

[25] *See United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000).

[26] *Id.* at 394. The *Arena* court defined the property as "the victim's right to conduct a business free from threats of violence and physical harm." *Id.* The court appeared to be confusing the purpose of the Hobbs Act – the protection of the free-flow of commerce – with the elements of the crime under it.

[27] The distinction between extortion and coercion is a significant one. The purpose of the former is the protection of property, the latter the protection of autonomy. The Model Penal Code and the majority of states maintain the distinction between extortion and coercion. *See* G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and*

(Continued on following page)

it is coercive, it is either constitutionally protected[28] or merely tortious.[29] In either case, petitioners' conduct is not extortive, and, therefore, is an insufficient predicate act to trigger the application of RICO.

Essentially respondents' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences businesses and consumers and involves any unlawful conduct. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need **obtain** nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." During the jury instruction conference, respondents recognized how strained their theory of Hobbs Act extortion was. When the district court inquired whether the respondents' theory of extortion encompassed non-violent trespass, the respondents stated, "Well, first of

---

Conspiracy Liability Under RICO, 33 Am. Crim. L. Rev. 1345, 1660-61 nn. 23-31 (1996). Only a minority of states categorize prohibitions of coercive conduct under the same heading as prohibitions on extortion. *See id.* at 1660 n. 27.

[28] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

[29] The evidence recounted by the district judge in his decision suggest that the petitioners or others associated with PLAN had committed only a number of torts: blockading clinic doors, pushing and shoving employees and patients, banging on cars, trespassing into abortion clinics, vandalizing clinics and clinic equipment. *NOW v. Scheidler*, ___ F.Supp. ___, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill., July 16, 1999) (*see* 01-1118 Pet. App. 110a-112a).

all, yes and no. I think for the most part yes."[30] (Jury Instruction Conference Tr. 4335). The respondents went on to admit that "if there were let's say a trespass that was going to destroy the flowerbeds . . . I think a threat of destroying your flowerbeds could be extortion." (Jury Instruction Conference Tr. 4335). Respondents then backed away from this comment but in the end accepted "trampling on flower beds" as sufficient for Hobbs Act extortion.[31] "But there is a line at some point where you're trampling on the flowerbeds and you're smashing the windows or a person might just say, hey, I'm going to close the office today because I don't want to deal with this." (Jury Instruction Conference Tr. 4336). Respondents' slippery interpretation is inconsistent with established case law because it disregards the requirement that petitioners "obtain" property in order to commit the crime of extortion.

---

[30] The district court's statement eliciting the response was: "So under your view – I suppose it would be under Mr. Sachnoff's view, the clinics, that **a trespass not involving force or violence**, a peaceful sit-in in the offices of the clinic undertaken in such a way that would prevent the clinic from doing business would be a violation of the Hobbs Act." (Jury Instruction Conference. Tr. 4334-35) (emphasis added).

[31] Plaintiffs suggested that trampling on flower beds probably would not create the requisite reasonable fear. "But the next question you have to look at is the fear reasonable and does it cause whatever the damage is you're talking about. So the answer might be no. So even though a threat – under the Hobbs Act I believe that a threat of any wrongful, unprivileged, unprotected activity designed to make somebody give up a right which reasonably caused them to do that, I think that would be extortion. I don't think stepping on your flowerbeds would meet that standard." (Jury Instruction Conference Tr. 4335).

IV. WITHOUT ANALYSIS, THE COURT BELOW DISREGARDED THE "OBTAINING" ELEMENT BY IMPLICITLY ADOPTING FLAWED "LOSS TO THE VICTIM" REASONING

The Seventh Circuit in this case, as did the trial court, summarily rejected petitioners' argument that they did not "obtain" property.[32] Without additional comment or analysis, the court of appeals erroneously relied on a purported "long line of precedent . . . holding that 'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'"[33] The court below cited only one case, *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995).[34]

However, a careful review of *Stillo* and its predecessor, *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987), demonstrates that those cases have also mistakenly linked two distinct legal principles – (1) that an extortionist need not personally benefit from the extortion and (2) that the property of which the victim is deprived need not be tangible – with the erroneous assertion that the gravamen of the crime of extortion is loss to the victim. *Stillo*, 57 F.3d at 559; *Lewis*, 797 F.2d at 364. The court below appears to have based its decision on these flawed analyses.

The Seventh Circuit has previously stated that to "secure a conviction under the Hobbs Act, the prosecution

[32] *NOW v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001).

[33] *Id.* (*quoting United States v. Stillo*, 57 F.3d at 559).

[34] *Id.*

does not have to show that the defendant acted to receive, either directly or indirectly, the proceeds of his extortion or any benefit therefrom."[35] To the extent that this is simply a reaffirmation of the principle that, to support a conviction for extortion, the property **obtained** need not constitute a personal gain or benefit **to the defendant**, this proposition is unremarkable. Clearly, the property or benefit may accrue to a third party designee, as opposed to the defendant. However, the property still must **be obtained** by either the defendant or the defendant's designee. Additionally, the Seventh Circuit has also previously concluded "the 'property' of which the victim is deprived need not be tangible . . . ."[36]

But to say that property need not be **tangible** is not to say that it need not be **property**. Apparently, relying on the conclusion that the "property" need not be tangible, the court below accepted the illogical and made the immense leap to conclude that any loss of rights is a loss to the victim, thereby satisfying the so-called "gravamen" of the offense. This flawed and illogical reasoning leads to the erroneous conclusion that there need be no "obtaining" of property by the petitioners or any related third party. The Seventh Circuit's decision in this case is wrong because it ignores the plain language of the Hobbs Act, the common law, and this Court's holding and analysis in *Evans*.

There is no RICO case here and, despite years of bankrupting litigation, there never has been. RICO

[35] *Lewis*, 797 F.2d at 364.

[36] *Lewis*, 797 F.2d at 364.

requires valid predicate acts. In this case, the respondents pled extortion under the Hobbs Act.[37] No extortion occurred because no obtaining was ever shown, as required by Congress, the plain language of the Hobbs Act, common law, and this Court's precedent.

These respondents and others similarly situated have adequate remedies for private harms, including trespass and vandalism, available to them under state law. This Court should limit the reading of extortion under the Hobbs Act to its proper meaning.

[37] The respondents also pled extortion under state law; however, issues related to state law extortion are not before this Court.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

NIKOLAS T. NIKAS
DENISE M. BURKE
(Counsel of Record)
DORINDA C. BORDLEE
AMERICANS UNITED FOR LIFE
310 South Peoria Street
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

July 12, 2002

* Noted for purpose of identification only

(21) (18)

Nos. 01-1118, 01-1119

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

VICTOR J. ROCCO
PRESIDENT, NEW YORK COUNCIL OF DEFENSE LAWYERS
120 West 45th Street
New York, New York 10036
(212) 832-8300

RICHARD A. GREENBERG*
KARL E. PFLANZ
NEWMAN & GREENBERG
950 Third Avenue
New York, New York 10022
(212) 308-7900
* *Counsel of Record*

Counsel for Amicus New York Council of Defense Lawyers

3hp

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT

CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE FEDERAL EXTORTION STATUTE, "OBTAINING OF PROPERTY FROM ANOTHER" MUST REFER TO AN ASSET, COMMODITY OR RIGHT WITH ECONOMIC VALUE CAPABLE OF BEING ASSIGNED, SOLD OR OTHERWISE TRANSFERRED, AND CANNOT INCLUDE MERE INTERFERENCE WITH CONSTITUTIONAL OR STATUTORY RIGHTS SUCH AS THE RIGHTS OF WOMEN TO OBTAIN ABORTION SERVICES OR THE DEMOCRATIC RIGHTS OF UNION MEMBERS 5

A. The Meaning of "Property" under the Hobbs Act 8

1. The Plain Language of the Statute 8

2. Legislative History and New York Law 11

3. The Federal Hobbs Act Cases .. 14

B. The Meaning of "Obtaining" under the Hobbs Act 18

C. The Doctrine of Constitutional Doubt .. 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Cleveland v. United States, 531 U.S. 12 (2000) 10

Connally v. General Constr. Co., 269 U.S. 385 (1926) 21

Dusing v. Nuzzio, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. Ulster Co.), *aff'd as modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (3d Dep't 1941) 16

Evans v. United States, 504 U.S. 255, 264 (1992) 8

FCC v. American Broadcasting Co., 347 U.S. 284 (1954) 22

G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp. 2d 233 (S.D.N.Y. 2001) 17, 18

Grayned v. City of Rockford, 408 U.S. 104 (1972) ... 22

Hamling v. United States, 418 U.S. 87 (1974) 22

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 22

Jones v. United States, 529 U.S. 848 (2000) 21, 22

McNally v. United States, 483 U.S. 350 (1987) . . 4, 10, 13

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 5, 11

People v. Learman, 261 App. Div. 748, 28 N.Y.S.2d 360 (4th Dep't 1941) 8

Reves v. Ernst & Young, 507 U.S. 170 (1993) 11

Screws v. United States, 325 U.S. 91 (1945) 23

Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) 14, 15, 18, 23

United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973) 22

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) 3, 19, 20

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 21

United States v. Bass, 404 U.S. 336 (1971) 12

United States v. Bellomo, 176 F.3d 580 (2d Cir. 1999) 3, 6, 17

United States v. Debs, 949 F.2d 199 (6th Cir. 1991) 6, 13, 16

United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, 778 F. Supp. 738 (S.D.N.Y. 1991) 6

United States v. Enmons, 410 U.S. 396 (1973) 8, 12

United States v. Harriss, 347 U.S. 612 (1954) 23

United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) 6, 13

United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1986) 6, 16

United States v. Nedley, 255 F.2d 350 (3d Cir. 1958) 8

United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114 (E.D.N.Y. 1992) 19

United States v. Thomas, 248 F.3d 76 (2d Cir. 2001) (*en banc*) 1

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 14

Williams v. United States, 341 U.S. 97 (1951) 22

STATUTES

18 U.S.C. §1341 ..... 9, 10

18 U.S.C. §1346 ..... 4, 7, 19

18 U.S.C. §1951 ..... 2, 6, 18

29 U.S.C. §411 6

29 U.S.C. §501(a) 6

OTHER AUTHORITIES

91 Cong. Rec. at 11,848 (Dec. 11, 1945) 12

91 Cong. Rec. at 11,913 (Dec. 12, 1945) 12

Brief for the United States, *Cleveland v. United States*, 531 U.S. 12 (2000) (No. 99-804) 10

INTEREST OF *AMICUS CURIAE* [1]

The New York Council of Defense Lawyers ("NYCDL"), established in 1986, is a not-for-profit professional association whose membership consists of approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. The NYCDL's principal mission is to engage the Bench and Bar, including government attorneys, in a continuing collegial dialogue — through symposia, retreats, lectures, testimony, *amicus* briefs, and special events — concerning the legal, ethical and practical issues confronting attorneys and judges in the criminal justice system, particularly in the federal courts of New York.

Because of the wide experience and expertise of its members, the NYCDL has been invited to appear as *amicus curiae* in federal and state appellate courts. *See, e.g., United States v. Thomas*, 248 F.3d 76 (2d Cir. 2001) (*en banc*). Representatives of the NYCDL have also testified before Congress and the United States Sentencing Commission.

---

1. Each party's blanket consent to *amicus* submissions has been filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the NYCDL or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

This Court has repeatedly recognized that Congress modeled the Hobbs Act, 18 U.S.C. §1951, after New York's extortion statute, and was informed by New York case law interpreting that statute. As a professional association consisting of New York attorneys with vast experience — as prosecutors and defense counsel — with both New York law and the Hobbs Act, the NYCDL is uniquely situated to comment on the important Hobbs Act issues raised by this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case reflected in the brief of petitioners Scheidler, Scholberg, Murphy and Pro-Life Action League, Inc.

SUMMARY OF ARGUMENT

In affirming petitioners' civil RICO liability for treble damages based on federal Hobbs Act predicates, the court of appeals misperceived the language, history and meaning of the Act (18 U.S.C. §1951), particularly the critical term "obtaining of property from another" in the Act's definition of "extortion." 18 U.S.C. §1951(b)(2). The lower court's misunderstanding is exemplified by the perfunctory manner in which it addressed and decided the far-reaching issue whether depriving patients of, or causing them to abandon, their right of access to abortion services constitutes "obtaining property" within the

meaning of the Act. *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 707, 709 (7th Cir. 2001). The same perfunctory and unsatisfying approach has infected lower court decisions in other Hobbs Act cases in the abortion protest context. *See United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (abortion protesters' Hobbs Act conviction upheld on the ground that, according to a dictionary entry, "obtain" is synonymous with "attain disposal of," so that extortion can be committed without anyone "obtaining" anything from victim).

Intimidating or violence-prone anti-abortion protests are not the only context in which the lower federal courts have adopted strained, perfunctory and ultimately insupportable interpretations of the plain language of the federal extortion statute. The same disturbing tendency is discernible in the emotion-laden context of Hobbs Act labor cases. *See, e.g., United States v. Bellomo*, 176 F.3d 580, 593 (2d Cir. 1999) (court concludes without analysis that "[t]he right of the members of a union to democratic participation in a union election is property [for purposes of the Hobbs Act]").

The plain language of the statute, as well as its legislative history and the common law meaning of extortion that the Hobbs Act was intended to embody, all weigh against the overly elastic interpretation of the Act reflected in the foregoing cases, whether in the anti-abortion or labor context. Only a handful of lower federal courts, however, have addressed these issues. As a result,

this case presents the Court with a perfect opportunity to arrest this aberrant tendency, whatever the context in which it is found, without unsettling Hobbs Act jurisprudence.

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected a similarly strained interpretation of the mail fraud statute, despite a far more developed and consistent pre-existing body of mail fraud jurisprudence. There is as much, or more, reason for the Court to adopt the same approach here, because the Hobbs Act subjects an offender to as much as 20 years' imprisonment (mail fraud penalties are far less severe); the Hobbs Act is narrower than the mail fraud statute; and Congress is capable of making clear, as it did in the mail fraud context by enacting 18 U.S.C. §1346, that it intends the term "obtaining of property" to have a broader meaning than the plain language, legislative history and common law understanding of the Hobbs Act currently would support. The judgment of the court of appeals should be reversed.

ARGUMENT

CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE FEDERAL EXTORTION STATUTE, "OBTAINING OF PROPERTY FROM ANOTHER" MUST REFER TO AN ASSET, COMMODITY OR RIGHT WITH ECONOMIC VALUE CAPABLE OF BEING ASSIGNED, SOLD OR OTHERWISE TRANSFERRED, AND CANNOT INCLUDE MERE INTERFERENCE WITH CONSTITUTIONAL OR STATUTORY RIGHTS SUCH AS THE RIGHTS OF WOMEN TO OBTAIN ABORTION SERVICES OR THE DEMOCRATIC RIGHTS OF UNION MEMBERS

This case presents important issues concerning the meaning of the Hobbs Act left open in *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 253 n.2 (1994) (*"Scheidler I"*). It also presents the Court with an opportunity to correct two errant lines of authority from the lower federal courts, both characterized by a strained and ultimately insupportable interpretation of the "obtaining property" element of the Hobbs Act.[2] The first

---

2. The Hobbs Act punishes by imprisonment for as much as 20 years anyone who obstructs or affects interstate commerce by robbery or extortion or attempts or (continued...)

line of authority arises in the emotionally charged context of anti-abortion protests, typified by the case now before the Court. The second line of authority arises in the equally freighted context of extortion prosecutions involving labor unions.[3] Both lines of authority are of

---

2. (...continued)
conspires to do so. 18 U.S.C. §1951(a). For purposes of the Act, "extortion" means "*the obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. §1951(b)(2) (emphasis added).

3. These cases hold generally that the core element of the extortion statute — "obtaining of property from another" — is satisfied by depriving union members of, or causing them to abandon, their right to democratic participation in union affairs, or depriving them of their right to loyal and responsible representation by union officials, rights guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§411 and 501(a). *See United States v. Bellomo*, 176 F.3d 580, 593 (2d Cir. 1999); *United States v. Debs*, 949 F.2d 199, 201-02 (6th Cir. 1991); *United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267, 281-82 (3d Cir. 1986); *United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America*, 778 F. Supp. 738, 755 (S.D.N.Y. 1991); *United States v. International Brotherhood of Teamsters*, 708 F. Supp.
(continued...)

relatively recent vintage, and each has generated only a handful of reported decisions. Thus, adopting the position of the NYCDL, and nipping this aberrant strain in the bud, will not unsettle well-established Hobbs Act jurisprudence. On the contrary, it will preserve the Hobbs Act against constitutional challenges on vagueness grounds.

If there is to be such a radical departure from the plain language and legislative history of the Hobbs Act, it should of course be Congress, and not the federal courts, which takes that step. If the Court adopts petitioners' and the NYCDL's interpretation of the Hobbs Act, Congress can easily amend the statute, if it so desires, to punish those who deprive others of rights, or cause others to abandon rights, even if the rights are not understood as "property," and even if the offender has not "obtain[ed]" those rights for himself or a third person. Congress did virtually the same thing when it enacted 18 U.S.C. §1346 to overrule legislatively the Court's decision in *McNally*, which had put an end to a long line of cases from the courts of appeals upholding the "honest services" theory of mail fraud.

---

3. (...continued)
1388, 1397-99 (S.D.N.Y. 1989).

A. The Meaning of "Property" under the Hobbs Act

1. The Plain Language of the Statute

The plain language of the Hobbs Act limits the meaning of the term "property" to the kind of property that can be "obtain[ed]." This language should foreclose any exotic interpretation of the term "property" that includes a woman's right of access to an abortion clinic or the right of labor union members to union democracy and to loyal and responsible representation by union officials, because none of these rights is commonly understood as either "property" or "obtain[able]" from another. On the contrary, the obvious and most natural interpretation of "property" that can be "obtained" within the meaning of the Hobbs Act is property in its common law sense, i.e., a thing capable of being assigned, conveyed or transferred. *See People v. Learman*, 261 App. Div. 748, 753, 28 N.Y.S.2d 360, 365 (4th Dep't 1941) ("The fact that an operator's license is not transferable or assignable shows that it is not property" for any purpose under New York's extortion statute).[4]

---

4. Because the Hobbs Act was modeled on New York's extortion statute (*Evans v. United States*, 504 U.S. 255, 264 (1992); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973)), New York extortion cases are highly relevant in construing the Hobbs Act. *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir. 1958) (when

(continued...)

The significance of the Hobbs Act's plain language — "the obtaining of property from another" — is reinforced by contrasting the Hobbs Act with the mail fraud statute which, by its terms, does not require an actual or contemplated deprivation of "property." *See* 18 U.S.C. §1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . ."). The omission of the term "property" from the quoted portion of the mail fraud statute encouraged the lower federal courts to interpret the statute broadly to include schemes intended to deprive another of intangible non-property rights, like the right to an agent's honest services. That interpretation was ultimately rejected by this Court in *McNally*, which limited the mail fraud statute to schemes designed to deprive the victim of property. The fact that the Hobbs Act, unlike the relevant portion of the mail fraud statute, contains the term "property," and requires "the obtaining of property from another" to commit the offense, refutes any notion that the Hobbs Act is broader than the mail fraud statute, and undermines any claim that the extortion statute reaches the kind of intangible, non-transferrable interests the mail fraud statute was once incorrectly thought to protect.

---

4. (...continued)
interpreting the Hobbs Act, federal courts are "required to look to the New York Penal Laws relating to robbery [and extortion] and the construction given them by the New York courts").

The scope of the Hobbs Act is comparable to that of the second clause of the mail fraud statute, which prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §1341. Indeed, the Solicitor General has recently argued in another case that because Section 1341 does not contain the key phrase "from another" after the words "obtaining money or property," the mail fraud statute covers schemes by which the offender "obtains something that might not be 'money or property' in the hands of the victim, but that becomes 'money or property' in the defendant's own hands." Brief for the United States at 12, *Cleveland v. United States*, 531 U.S. 12 (2000) (No. 99-804). Thus, the Hobbs Act, which *does* require that property be obtained "from another," is, if anything, even more restrictive than the "obtaining property" clause of the mail fraud statute.

In other words, by its terms, the Hobbs Act protects property and property rights, and not intangible, non-transferrable rights like a woman's right of access to abortion services or the LMRDA rights of union members. As this Court has recently and repeatedly warned in rejecting expansive interpretations of the mail fraud statute, "'if Congress desires to go further, it must speak more clearly than it has.'" *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (quoting *McNally*, 483 U.S. at 360).

Where, as here, "the statutory language is unambiguous" and the legislative history presents no "'clearly expressed legislative intent to the contrary,' that

would warrant a different construction" (*Scheidler I*, 510 U.S. at 261 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993))), the language of the statute should control. Thus, just as this Court relied on the plain language of the RICO statute in rejecting these petitioners' argument in *Scheidler I* that RICO should be limited to economically motivated conduct, this Court should find that the plain language of the Hobbs Act precludes the interpretation of "obtaining of property from another" urged here by the respondents.

2. Legislative History and New York Law

The legislative history of the Hobbs Act strongly supports the conclusion that the Act does not reach interference with the intangible rights of women to gain access to abortion services or the intangible democratic rights of union members conferred by the LMRDA. In view of petitioners' extensive analysis of the legislative history of the Hobbs Act and the relevance and meaning of New York extortion jurisprudence, no point would be served in duplicating that effort here.

One point, however, deserves emphasis. The congressional debates on the Hobbs Act demonstrate that Congress was cognizant of, and concerned about, the possibility that the Hobbs Act would federalize conduct

that had always been prosecuted locally.[5] In *United States v. Enmons*, 410 U.S. 396 (1973), this Court expressed the same federalism concerns about the Hobbs Act:

> "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

Id. at 411-12 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Congress's concern with the federalism implications of the Hobbs Act is significant. Similar concerns prompted this Court in *McNally* to limit the reach of the mail fraud statute and to reject "honest services" mail fraud as a viable theory:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 360.[6]

---

5. *See, e.g.*, 91 Cong. Rec. at 11,848 (Dec. 11, 1945) (remarks of Rep. Powell) ("Extortion and robbery are crimes in all 48 states. Ample state laws and police are provided"); *id.* at 11,913 (Dec. 12, 1945) (remarks of Rep. Resa) ("[O]ffenses against persons and property which the pending bill would make punishable are already punishable under existing law of the several states. They can be prosecuted more effectively under the laws of the states than they could be under this bill if it became a law. . . . This is another instance of objectionable duplication of the Federal Government of the functions and activities of the states").

6. The federalism concerns triggered by the Hobbs Act, which have been articulated by this Court as well as Members of the Congress that enacted the statute, contradict the reasoning of several lower federal courts that have found that *McNally* did not provide a basis for limiting the meaning of "property" under the Hobbs Act. *See United States v. Debs*, 949 F.2d at 201-02 (*McNally* was "clearly concerned with federalism" and the federalism rationale "has no analogue in the union arena"); *United States v. International Brotherhood of Teamsters*, 708 F. Supp. 1388, 1399 (S.D.N.Y. 1989) (characterizing LMRDA rights as property "does not involve the federal government in setting arbitrary standards for conduct in a way that the same characterization of the ethereal and changeable notions of 'good government' or 'honest and

(continued...)

3. The Federal Hobbs Act Cases

The Second Circuit has held that the concept of "property" under the Hobbs Act, while not limited to physical or tangible property, must be at least a "valuable right considered as a source or element of wealth." *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969)). Although it represents an unwarranted expansion of New York law as it existed when the Hobbs Act was enacted, the *Tropiano* formulation still does not support the lower court's interpretation of the Hobbs Act in this case. Even if the overly broad *Tropiano* standard were adopted, intangible rights such as a woman's right to gain access to abortion services or the democratic rights of union members could not be considered property, since "a source or element of wealth" is reasonably understood to mean an asset, commodity or right with economic value and capable of being transferred, assigned or sold.

In *Tropiano* itself the court deemed "the right to solicit business" to be "property" (418 F.2d at 1075-76), a

---

6. (...continued)
faithful services' would"). Stretching the concept of "property" in the Hobbs Act to reach interference with abortion rights or union democracy would reduce the term "property" itself to an "ethereal and changeable notion," thus involving the federal government in "setting arbitrary standards for conduct."

conclusion that was at least defensible, since "the right to solicit business" could be considered the equivalent of a non-compete clause which is often economically valued and compensated in commercial transactions. By contrast, in *Town of West Hartford*, the Second Circuit recognized that characterizing as property under the Hobbs Act "altered official conduct," i.e., "a softened response" by town law enforcement officials to the illegal conduct of abortion protesters, was "so blatantly implausible that its rejection requires no aid from the rule of lenity." 915 F.2d at 102.

Like the "altered conduct" in *Town of West Hartford*, a woman's right of access to abortion services or the democratic rights of labor union members cannot be considered "a source or element of wealth" in themselves. Such rights therefore cannot be "property" within the meaning of the Hobbs Act, any more than marrying a wealthy woman is "a source or element of wealth" for purposes of the Hobbs Act. Certainly no one would suggest that interference with or the prevention of such a marriage by the family of the woman could constitute obtaining property from a fortune-seeking spouse within the meaning of the Act. Interference with abortion rights or union members' LMRDA rights is, if anything, an even more attenuated or indirect "source or element of wealth."

True, the right of access to abortion services or the democratic rights of union members may somehow have economic consequences that could arguably be viewed as "a source or element of wealth." Almost everything can or

does. *Tropiano's* formulation of the meaning of "property" in the Hobbs Act cannot simply mean having indirect economic consequences. At the very least, the test must be whether a right or thing can itself be economically valued. That was the historic meaning of property under New York's extortion statute, and that was the kind of property that the legislative history shows Congress had in mind when it passed the Hobbs Act.

Viewed in this light, the handful of federal cases holding or suggesting that the LMRDA rights of union members are Hobbs Act "property" should be seen as aberrant. Certainly those cases are devoid of any real analysis. For example, the Sixth and Third Circuits inexplicably relied on *Dusing v. Nuzzio*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. Ulster Co.), *aff'd as modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (3d Dep't 1941), as support for the proposition that "rights incident to union membership are protectible property interests" under New York law, and are therefore "property" for purposes of the Hobbs Act. *United States v. Debs*, 949 F.2d 199, 201 n.2 (6th Cir. 1991); *United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267, 281-82 (3d Cir. 1986). *Dusing*, however, was not an extortion case, but an injunctive proceeding on equitable grounds seeking to force a union to hold elections and to give an accounting. It has no relevance to interpreting the Hobbs Act or New York's extortion statute. In fact, *Dusing* has never been cited by any New York court, state or federal, in the context of an extortion prosecution, let alone as authority

for a broad interpretation of the term "property" under the Hobbs Act.

The Second Circuit fares no better. In *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999), the court stated in conclusory fashion that "[t]he right of the members of a union to democratic participation in a union election is property; that the right is intangible does not divest it of protection under the Hobbs Act." *Id.* at 593. The only authority *Bellomo* cited for that far-reaching proposition was the Third Circuit's decision in *Local 560*, which depended heavily on *Dusing*. Moreover, neither side had briefed the "property" issue in *Bellomo*. Thus, the validity of the Second Circuit's holding in *Bellomo* — or even whether it is a holding — is questionable.

In short, however "valuable" abortion rights may be to women, and LMRDA rights to union members, they are at best an indirect, attenuated and uncertain "source or element" of pecuniary wealth. Those rights have no independent economic value any more than does the First Amendment right of a business to petition government for favorable economic legislation. *See G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 256 (S.D.N.Y. 2001) (Hobbs Act claim fails because victim's "First Amendment right to petition government does not constitute property that can be extorted").[7]

---

7. The court in *G-I Holdings* believed that democratic participation in union affairs was "more clearly (continued...)

B. The Meaning of "Obtaining" under the Hobbs Act

Petitioners' brief comprehensively addresses the meaning of "obtaining" in the Hobbs Act, and no point would be served by duplicating that effort here. Suffice it to say that while it may be possible, through "force, violence, or fear, or under color of official right" (18 U.S.C. §1951(b)(2)), to deprive another of intangible rights, or to prevent another from enjoying such rights, it is simply not possible for a purported extortionist (or a third party) to "obtain" the rights from the victim, as required under the Hobbs Act.

The distinction between obtaining property and altering conduct (*see Town of West Hartford*, 915 F.2d at 102) has been recognized by at least one federal court as the distinction between extortion and coercion. While

---

7. (...continued)
economic in nature" than petitioning government for "economically favorable legislation . . . by an interested business entity," i.e., seeking protective legislation from ruinous asbestos-related lawsuits. 179 F. Supp. 2d at 256-57. The court was mistaken. It is hard to imagine a right more clearly "economic in nature" than the right of asbestos companies to petition Congress for legislation protecting them from civil damage actions. Even if union democracy is "more clearly economic in nature," LMRDA rights are not nearly "economic" enough to constitute "property" under the Hobbs Act.

extortion requires "the obtaining of property from another," "[c]oercion is the compelling of a person (by instilling fear in him) to do an act (or not to do an act) which that person has a legal right not to do (or to do)." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1131 (E.D.N.Y. 1992). Coercion is precisely the conduct engaged in by petitioners, who attempted to prevent clinics and doctors from providing, and patients from receiving, abortion services, or by someone who would attempt to compel union members not to participate in their union's affairs by exercising their democratic union rights. Coercion, i.e., using force or fear to interfere with the exercise of a person's legal rights, is not extortion, i.e., using force or fear to *obtain* a person's property; nor is coercion a RICO predicate. *Private Sanitation*, 793 F. Supp. at 1131-32.

If Congress had wanted the Hobbs Act to reach interference with interstate commerce through coercion as well as robbery and extortion, it could easily have added coercion to the statute. Indeed, Congress can still do so by amending the statute, just as Congress amended the mail fraud statute after *McNally* by adding 18 U.S.C. §1346. The federal courts, however, are not free to do so.

Perhaps the best example of the lengths to which the federal courts have been compelled to go to fit the square peg of interference with personal rights into the round hole of "obtaining of property" under the Hobbs Act is *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), where the Hobbs Act convictions of abortion activists

were upheld because of the court's conclusion, based only on creative use of the dictionary, that "obtaining" property from another is synonymous with causing another to "abandon" property:

> A perpetrator plainly may "obtain[]" property without receiving anything, for obtaining includes "attain[ing] . . . disposal of," *Webster's Third New International Dictionary* 1559 (1976); and "disposal" includes "the regulation of the fate . . . of something," *id.* at 655. Thus, even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless "obtain[ed]" that property if she has used violence to force her victim to *abandon* it.

180 F.3d at 394 (emphasis added). Where a lengthy prison sentence is the likely consequence of a conviction under the Hobbs Act, the process of appellate adjudication that occurred in *Arena* — essentially reading out of the statute the element of "obtaining," with all its common law history, and replacing it with a dictionary definition with a totally different meaning — presents a cautionary tale. Such expansive interpretations of federal criminal statutes should be discouraged.

C. The Doctrine of Constitutional Doubt

Because of the severe consequences of violating the Hobbs Act, the doctrine of constitutional doubt should be applied to this case and to the interpretation of the Act generally. Under that doctrine, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter.'" *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

Interpreting the term "obtaining of property" to include interference with or causing the abandonment of abortion rights or LMRDA rights of union members would likely render the Hobbs Act void for vagueness.[8] To avoid

---

8. If the term "obtaining of property" in the federal extortion statute is interpreted to include interference with a woman's right of access to abortion services or labor union members' LMRDA rights, that provision would be unconstitutionally vague as applied because it would "forbid[] . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The statute would suffer from the twin evils that the vagueness doctrine is intended to avoid: it would deprive citizens of "a reasonable opportunity to know what is prohibited, so

(continued...)

that constitutional problem, the scope of the statute should be construed as being limited to the "obtaining of property," as those terms are ordinarily understood "in [other] legislation" and "in conversation." *Jones*, 529 U.S. at 855. Thus, a narrow interpretation of the term "obtaining of property" is appropriate in this case, not only because it accords with logic, the legislative history and underlying purpose of the Hobbs Act, and "the common perception" (*id.* at 856), but also because "a close construction will often save an act from vagueness that is fatal." *Williams v. United States*, 341 U.S. 97, 101 (1951); *see also Hamling v. United States*, 418 U.S. 87, 113-14 (1974); *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973); *United States v.*

---

8. (...continued)
that [they] may act accordingly," and it would "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The fact that this is a civil RICO case would not bar a constitutional vagueness challenge since a statute that "has criminal applications . . . must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 257 (1989) (Scalia, J., concurring) (citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)).

Harriss, 347 U.S. 612, 617-24 (1954); *Screws v. United States*, 325 U.S. 91, 98 (1945).[9]

* * *

Whatever their motivation, intimidation or coercion by abortion protesters or by those who would corrupt labor unions should not be punished under the Hobbs Act by doing violence to the language and history of the statute. Regardless of the identity or motives of the actor, conduct that is only coercive, like that of the abortion protesters in this case, does not make out "obtaining of property" within the meaning of the Hobbs Act.

---

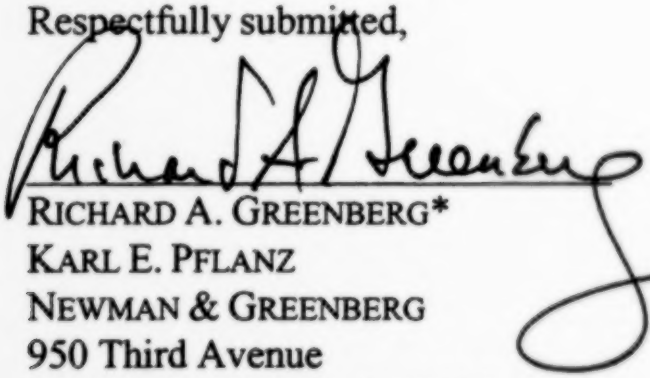
9. Although this is not a criminal case, the rule of lenity applies, since this civil RICO case is predicated upon a criminal statute. *Town of West Hartford*, 915 F.2d at 102 (collecting cases). The rule of lenity requires adoption of the narrower construction of the Hobbs Act that the NYCDL and petitioners urge upon the Court.

CONCLUSION

For the reasons set forth above, and for those set forth in the brief for petitioners Scheidler, et al., the judgment of the court of appeals should be reversed.

Dated: New York, New York
July 12, 2002

Respectfully submitted,



RICHARD A. GREENBERG*
KARL E. PFLANZ
NEWMAN & GREENBERG
950 Third Avenue
New York, New York 10022
(212) 308-7900

VICTOR J. ROCCO
PRESIDENT, NEW YORK COUNCIL
OF DEFENSE LAWYERS
120 West 45th Street
New York, New York 10036
(212) 832-8300

Counsel for Amicus New York Council of Defense Lawyers

* Counsel of Record

(22) (19)

Nos. 01-1118 and 01-1119

Supreme Court U.S.
FILED
JUL 12 2002
CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief Amicus Curiae Of Seamless Garment Network, Feminists For Life Of America, The Fund For Animals, Not Dead Yet, Sojourners, Witnesses For Reconciliation, Wendell Berry, Abe Bonowitz, Bernard Broussard, Carol Crossed, Will Davis Campbell, Ruth Enero, Nat Hentoff, Kathy Kelly, Rachel Macnair, Michele Pflaum, Mary S. Rider, Martin Sheen, Howard Zinn, Et Al., In Support Of Petitioners

EDWARD MCGLYNN GAFFNEY, JR.*
VALPARAISO UNIVERSITY SCHOOL OF LAW
Wesemann Hall
Valparaiso, IN 46383
219-465-7860
* *Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6/P3

WILLIAM W. BASSETT
Univ. of San Francisco
School of Law
San Francisco, CA 94117
415-422-6625

G. ROBERT BLAKEY
Notre Dame Law School
Notre Dame, IN 46556
219-531-5717

ANGELA C. CARMELLA
Seton Hall Univ.
School of Law
One Newark Center
Newark, NJ 07102
973-642-8843

JOSEPH MATTHIAS
COSGROVE, ESQ.
1460 Wyoming Avenue
Forty Fort, PA 18704
570-287-0921

ROBERT A. DESTRO
Catholic Univ. of America
Columbus School of Law
Washington, DC 20064
202-319-5140

MARIE A. FAILINGER
Hamline Univ.
School of Law
1536 Hewitt Avenue
St. Paul, MN 55104-1236
651-523-2124

MICHAEL J. PERRY
Wake Forest Univ.
School of Law
Winston-Salem, NC 27106
336-758-5457

VICTOR GREGORY ROSENBLUM
Northwestern Univ.
School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

GERALD F. UELMEN
Santa Clara Univ.
School of Law
500 El Camino Real
Santa Clara, CA 95053
408-554-5729

List of Amici Curiae

Communities and Voluntary Associations

Seamless Garment Network, Agape, Americans Disabled for Accessible Public Transit, Carolina Interfaith Task Force on Central America, Catholic Peace Fellowship, Center for Action and Contemplation, Center for Peace Studies at Georgetown University, Citizens United for Alternatives to the Death Penalty, The Conference of Major Superiors of Men, Dorothy Day Catholic Worker House, Eighth Day Center for Justice, Embrace a Consistent Ethic, Every Church a Peace Church, The Faith Community of St. Sabina's, Feminists for Life of America, Feminists for Life of New York, Franciscan Office of Justice, Peace, and the Integrity of Creation, The Fund for Animals, Nevada Desert Experience, Not Dead Yet, The Orthodox Peace Fellowship in North America, Pax Christi USA, The Peter Maurin Center, Plowshares, Sojourners, Vieques Support Committee, Voices in the Wilderness, and Witnesses for Reconciliation.

Individuals

David Atwood, Donald Bauer, Michael Baxter, Daniel Berrigan, Philip Berrigan, Wendell Berry, Abe Bonowitz, Roy Bourgeois, Bernard Broussard, Will Davis Campbell, Thomas Cornell, Carol Crossed, John Dear, Stephen Dear, Richard Deats, Peter DeMott, Jim and Sally Douglass, William and Eugenia Durland, Ruth Enero, Mary Anne Flores, Bruce Friedrich, Clare Grady, Ellen Grady, Thomas Gumbleton, Nat Hentoff, Lana Jacobs, Kathy Kelly, Art Laffin, Andy Lipscomb, Rachel MacNair, Elizabeth McAlister, Deborah McEvoy, Richard McSorley, Paul Magno, Anne Montgomery, Charles Mulholland, Barry Nakell, Lillibeth Navarro, John W. Oliver, Patrick O'Neill, Michele Pflaum, Michael Pfleger, Gail Phares, Helen Prejean, Mary S. Rider, Scott and Claire Schaeffer-Duffy, Martin Sheen, Kathy Boylan Shields, Jessica Stewart, John Stoner, Andrew L. Sullivan, Brian Turrell, Howard Zinn, and Stephen Zunes.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Interest of Amici Curiae	1
Summary of Argument	2
Argument	4
I. The novel view that the crime of extortion may occur without any "obtaining of property" is unprecedented and unsupported in legal history from the common law to the adoption of RICO	4
II. If the novel theory of extortion adopted by the court of appeals were the law of the land at any earlier period of our history, it would have been a major impediment to all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation	12
III. The draconian remedies of RICO – treble damages, prohibitive injunctions, and attorneys fees – were not intended by Congress to punish unpopular social protesters, whose civil disobedience may be punished adequately through other legal remedies	25
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Adderley v. Florida, 385 U.S. 39 (1966).....19
Beck v. Prupis, 529 U.S. 494 (2000).....30
Bell v. Maryland, 378 U.S. 226 (1964).....9, 11, 19
Bell v. United States, 462 U.S. 356 (1983).....9
Bouie v. Columbia, 378 U.S. 347 (1964).....19
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).....26
Brown v. Louisiana, 383 U.S. 131 (1966).....19
Carter v. United States, 530 U.S. 255 (2000).....10
Center Cadillac v. Bank Leumi Trust Co., 808 F. Supp. 213 (S.D.N.Y. 1992).....11
Cox v. Louisiana, 379 U.S. 536 (1965).....9, 19
Dred Scott v. Sandford, 60 U.S. 393 (1856).....17
Evans v. United States, 504 U.S. 255 (1992).....10
H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).....11
Marbury v. Madison, 5 U.S. 137 (1803).....29
Morrisette v. United States, 342 U.S. 246 (1952).....9
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).....9, 27
National Organization for Women v. Scheidler, 510 U.S. 249 (1994).....1, 26
National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992).....23
New York Times v. Sullivan, 376 U.S. 264 (1964)...2, 24, 25

TABLE OF AUTHORITIES – Continued

Page

Northeast Women's Center v. McMonagle, 868 F.2d 1342 (3d Cir.) *cert. denied*, 493 U.S. 901 (1989).....3
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).....8
Perrin v. United States, 444 U.S. 37 (1979).....9, 11
Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972).....26
State v. Ullman, 5 Minn. 1 (1861).....10
Taylor v. United States, 495 U.S. 575 (1990).....9, 11
Texas v. Johnson, 491 U.S. 397 (1989).....15
Sim's Case, 61 Mass. (7 Cushing) 285 (1851).....17
United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873).....21
United States v. Enmons, 410 U.S. 396 (1973).....7
United States v. Grace, 461 U.S. 171 (1984).....8
United States v. Nardello, 393 U.S. 286 (1969).....9, 10, 11
United States v. Nedley, 255 F.2d 350 (3d Cir. 1958).....8
United States v. O'Brien, 391 U.S. 367 (1968).....15
United States v. Panaro, 266 F.3d 939 (9th Cir. 2001).....8
United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114 (1992).....11
United States v. Spock, 416 F.2d 165 (1st Cir. 1969).....29
United States v. Turley, 352 U.S. 407 (1957).....9, 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

Const. of the Confederate States of Amercia, Preamble 14

U.S. Const. amend. I 8, 26

U.S. Const. amend. XIII 22

U.S. Const. amend. XIX 22

U.S. Const. Preamble 1

RULES

F. Rules Civ. P., Rule 15(b) 30

Sup. Ct. R. 37.6 1

STATUTES

Civil Rights Act of 1964 24

Federal Access to Clinic Entrance Act, 18 U.S.C. §248 ..... 3, 6, 30

Hobbs Act, 18 U.S.C. §1951 ..... 4, 7, 30

Voting Rights Act of 1965 24

LAW REVIEW ARTICLES/BOOKS

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) 18

American Law Institute, Model Penal Code §223.4 (1980) 10

William Blackstone, *Commentaries on the Laws of England* (1765) 9, 20

TABLE OF AUTHORITIES – Continued

Page

G. Robert Blakey and Kevin P. Roddy, "Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO," 33 Am. Crim. L. Rev. 1345 (1996) 9, 10, 11, 27

Taylor Branch, *Parting the Waters* (1988) 18

The Works of John C. Calhoun (1855) 14

Stephen Campbell, *The Slave Catchers* (1968) 17

Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* (1985) 23

Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971) 13

Edward Coke, *First Institute* (J. Thomas ed. 1826) 9

Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975) 17

Eric Foner, *Reconstruction, America's Unfinished Revolution 1863-1877* (1988) 17

Edward McGlynn Gaffney, "History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court," 25 Cath. U. L. Rev. 207 (1976) 17

Edward McGlynn Gaffney, "Politics Without Brackets on Religious Convictions," 64 Tulane L. Rev. 1143 (1990) 17

Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Termperance Movement* (2d ed. 1986) 23

Hugh Hawkins, ed., *The Abolitionists: Immediatism and the Question of Means* (1964) 17

TABLE OF AUTHORITIES – Continued

Page

William Hawkins, *A Treatise of the Pleas of the Crown* (6th ed. 1788).....10

Sanford Kadish, "The Model Penal Code's Historical Antecedents," 19 Rutgers L. J. 521 (1988).....10

James Kent, *Commentaries on American Law* (1826).....21

Linda K. Kerner, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998).....21

Martin Luther King, Jr,. *Stride Toward Freedom: The Montgomery Story* (1958).....19

Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991).....24

The Liberator (Jan. 1, 1831).....14, 16

James Lindgren, "The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act," 35 UCLA L. Rev. 815 (1988)..... 9

Alma Luz, "Susan Brownell Anthony," 1 *Notable American Women, 1607-1950: A Biographical Dictionary* (Edward James ed. 1971).....16

Edward Madden, *Civil Disobedience and Moral Law in Ninetheenth-Century American Philosophy* (1968).....13

Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 26 Valparaiso U. L. Rev. 21 (1991).....13

Brian Murray, "Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms," 75 Notre Dame L. Rev. 691 (1999).....9, 27

TABLE OF AUTHORITIES – Continued

Page

John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., *Religious Freedom* (2001).....15

Philip S. Paludan, *A Covenant with Death: the Constitution, Law and Equality* (1975).....15

William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).....21

Louis Ruchames, ed., *The Abolitionists: A Collection of Their Writings* (1963).....15

Jospeh Scheidler, "Violence: Why It Doesn't Work," in *Closed – 99 Ways to Stop Abortion* (1993)..... 5

Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (2d ed. 1974).....16

Aviam Soifer, "Status, Contract, and Promises Unkept," 96 Yale L. J. 1916 (1987).....17

Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1874, Against the Liquor Crime* (1972).....23

David Weber, ed., *Civil Disobedience in America: A Documentary History* (1978).....13, 22

C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974).....18

John Chong Yoo, "Who Measures the Chancellor's Foot?" 84 Calif. L. Rev. 1121 (1996).....26

Howard Zinn, *A People's History of the United States* (1999).....12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

91 Cong. Rec. 11,900 (1945).....27, 29

115 Cong. Rec. 9569 (1969).....27

116 Cong. Rec. 845, 845-46 (1970).....29

116 Cong. Rec. 972 (1970).....28

116 Cong. Rec. 18,941 (1970).....28

George W. Bush, Remarks on the Middle East, 38 Weekly Comp. Pres. Doc. 1091 (June 24, 2002) 6

Declaration of Independence, 1 Stat. 1 (1776) 1, 12

Declaration of Sentiments of the Seneca Falls Convention (1848) 1

Fort Hill Address (1831) 14

Letter of Angelina E. Grimké to Catherine E. Beecher, June 12, 1837 16

Measures Relating to Organized Crime: Hearings on S.30 and Related Measurse Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475-76 (1969).....27

S. 1861, 91st Cong. §2(a) (1969) 27

S. Rep. No. 91-617.....27, 28

1 S.C. Statutes at Large 329 (1832) 14

Draft of the South Carolina Exposition (1828) 14

South Carolina Ordinance of Nullification (1832) 14

Virginia Declaration of Rights (June 1776) 12

STATEMENT OF INTEREST OF AMICI CURIAE

Amici[1] are voluntary associations and individuals committed to principles of nonviolent direct action on a wide range of social issues. The general interest of the amici in this case is that, if uncorrected by this Court, the unwarranted expansion of the federal racketeering law by the court of appeals will repress the function of popular protest in the American constitutional order. At the very center of American constitutionalism is the commitment to truths our founders acknowledged as self-evident: that all men and women are created equal, that they are endowed by their Creator with certain inalienable rights (including life, liberty, and the pursuit of happiness) and that governments instituted to secure these rights derive their just powers from the consent of the governed. Declaration of Independence, 1 Stat. 1 (1776); Declaration of Sentiments of the Seneca Falls Convention (1848).

As we suggest below, the government has from time to time and in various ways violated these foundational truths. In such times, the People have often been the moral compass, disagreeing with existing policies and calling the nation forward to a deeper understanding of the fundamental truths at the heart of the American experiment, such as the right to life and the right to liberty. "We, the People" ordained and established the Constitution for the United States, ratified it in popular conventions, amended it over time to provide for a more perfect Union. U.S. Const., Preamble. The law, in short, has not only been an instrument of establishing justice, but has also become a means of coerced injustice. At each

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Professor Blakey represented the Scheidler respondents before this Court in *NOW v. Scheidler*, 510 U.S. 249 (1994), but is not counsel to the petitioners at this stage in the litigation.

of the critical turning points in our nation's history, the People have protested the moral flaws of the law, whether enacted by the people's representatives or pronounced by the judiciary.

Popular resistance to law is not justified merely because a lot of people engage in it. Lynch mobs were the classic example of violent popular power that is repugnant to our Constitutional order. But nothing analogous to that sort of violence is attributable to any of the petitioners in this case. The Court should secure one of the noblest features of American democracy, the right of the People to engage in non-violent protest against governmental violence and against violations of fundamental liberties, including the inalienable right to life itself.

The willingness of an organization or individual to appear before this Court in this brief does not necessarily imply that the organization or person agrees with the substantive views of the petitioners about abortion. Some of the amici support the views of the petitioners; others oppose these views; still others have no official view on this matter. But all of the amici join this brief because the novel view of extortion expressed by the court of appeals exposes them to liability under RICO in a manner that is at odds both with the legal history of extortion and with the social history of public protest, including civil disobedience, in this country. The decision below should be reversed because it violates the core principle of the First Amendment: the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 264, 270 (1964).

This brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk of the Court. The particular interests of the amici curiae are stated in Appendix A.

SUMMARY OF ARGUMENT

The theory of extortion adopted by the court of appeals is novel. Never in the history of the common law was

extortion understood to comprehend a loss of business opportunity by the victim. Only most recently and never with the blessing of this Court has the crime of extortion been understood to apply to social protest in which the protesters do not obtain property from those against whom they were protesting. *See Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir.) *cert. denied*, 493 U.S. 901 (1989). The interpretation of RICO adopted by the court of appeals is, moreover, contradicted by the history surrounding the adoption of this statute, in which Congress expressly and clearly indicated that it did not mean RICO to be used against social activists. Against this historical perspective, RICO should not be read to grant boundless authority to federal courts to redefine the predicate offense of extortion in a manner that flies in the face of the clear understanding of this crime in state legislation, as construed definitively by state courts.

Second, if the novel view of extortion advanced by the court of appeals were the law of the land at any earlier period of our history, it would have been a major impediment to all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation. In particular the movements to abolish slavery, to end racial discrimination, to include women within the franchise and the full obligations of citizenship, and to end irrational gender discrimination would have been set back severely. This reading of our history cautions against the expansion of civil RICO to nonviolent protesters who occasionally employ the tactic of civil disobedience to manifest their protest to the current status of the law.

Third, adequate remedies exist in state law to punish those who employ civil disobedience as a means of challenging the current state of the law. For example, a person who trespasses upon private property is subject to the laws of the several states concerning trespass. In 1994 Congress acted to protect the owners of abortion clinics through a federal statute known as the Federal Access to Clinic Entrance Act [FACE], 18 U.S.C. §248. This statute was enacted because Attorney General Reno and the Attorneys General of several states took the view that no

federal law – including the Hobbs Act and RICO – afforded any protection to abortion clinics under the circumstances of protests in front of clinics at the time. The court of appeals has stretched RICO far beyond the intent of Congress and has needlessly intervened in the traditional domain of the states to maintain public peace in the context of expression of viewpoints on controversial matters of public concern.

ARGUMENT

I. The novel view that the crime of extortion may occur without any "obtaining of property" is unprecedented and unsupported in legal history from the common law to the adoption of RICO.

A. The confusion of loss of business opportunity with "obtaining of property." The court of appeals sustained the imposition of massive civil damages upon the three named individual petitioners under the federal racketeering statute. The legal lynchpin of this use of RICO is that the petitioners conducted or participated in the conduct of the affairs of the Pro-Life Action Network [PLAN] through a pattern of "predicate acts" of extortion in violation of the Hobbs Act, 18 U.S.C. §1951, and various state extortion statutes, the history of which we discuss below. In reaching this result, the court of appeals sustained the district court "in all respects," Pet. App. 31a.

The district court allowed the jury to hear the following evidence as probative of "extortion." "Obtaining" property was proved on respondents' showing a temporary delay in keeping an appointment at an abortion clinic. Tr. 5005. The clinics' lost "property" was the money spent on "extraordinary security costs." Tr. 572. Respondents did not allege or seek to prove any loss of business *per se*. Demonstrating, being in the way, delaying access, without more, was equated with violence to discourage patients, Tr. 712, from keeping their appointments and force clinics to pay additional security costs. Tr. 607.

The court of appeals ruled that any errors that may have occurred in this handling of the evidence were "harmless," Pet. App. 30a, because the court of appeals adopted the respondents' theory that they did not need to demonstrate that the petitioners sought specifically to "obtain property," but that it was enough to demonstrate that the petitioners interfered with the personal rights of the owners of abortion clinics. Tr. 4987; 550.

As for acts of actual physical violence, the court of appeals sustained the decision of the district court allowing the plaintiffs to introduce before the jury irrelevant evidence about the conduct of persons never identified in the trial. Whoever these parties were, their acts against various abortion providers, Tr. 685, 687, 723, 1148, 1486, 2147-50, over the fourteen years from 1984 to trial were most emphatically not the acts of any of the named petitioners, all of whom are committed exclusively to nonviolent direct action in the tradition of Mohandas Gandhi and Dr. Martin Luther King, Jr.

For example, the lead petitioner has explained that in his protest activity he uses "strict guidelines: no touching or barring the entrance, no harassment, no name-calling, no 'planting a guilt trip.'" Interview with Joseph Scheidler, *Ms.* [Magazine], Plaintiff's Exhibit No. 628, at 7. And he has stated unequivocally: "I am opposed to physical actions against a clinic that would cause any physical harm or material damage. I demand non-violent direct action. I am for trespassing to save life, and support a peaceful presence and a sit-in in order to talk to the women having abortions." *Id.* at 12. *See also* Joseph Scheidler, "Violence: Why It Doesn't Work," in *Closed – 99 Ways to Stop Abortion* chapter 81 (1993), Defendants' Exhibit No. 2. Similarly, Operation Rescue demanded pledges of non-violence from those who took place in their activities, which were wholly separate from any activities organized by PLAN, Plaintiffs' Exhibit 221.

In this tradition of nonviolent direct action to protest conditions of perceived injustice, petitioners and many of the amici have engaged sometimes in illegal acts such as

trespass that are fully punishable under state law or under federal statutes such as the Federal Access to Clinic Entrance Act [FACE], 18 U.S.C. §248. But they have never advocated, let alone taken part in, any crime of violence against any other human being. They pose no threat to human life, and they engage in protests on a wide variety of social issues with one common thread: respect for human life in all of its manifestations.

Without a scrap of evidence that any of the three named petitioners ever committed any act of violence at any time, respondents smeared the petitioners not with a broad stroke, but with a tar brush. Since there was no proof that any petitioner was responsible for the murders, arsons, and kidnappings that the respondents introduced into evidence, the district court excluded such evidence from the trial for the purpose of blaming defendants, but gave the respondents free rein to refer to such incidents as "background information" for the purpose of evaluating whether the petitioners were guilty of "extortion." Tr. 685, 723, 1486, 5181. This is not harmless error. It is a grave mistake that turns civil courts into battlegrounds of incivility and that transforms RICO into a bludgeon with which people can pummel their ideological adversaries.

Anyone familiar with the problem of unringing a bell knows that presentation of evidence of this kind to a jury cannot be cured with a teaspoon of medicine at the end of the trial asking the jury to ignore what it was allowed to hear as part of the "context" within which they should evaluate the words and speeches of the petitioners, to determine whether these words constituted "threats" of "violence." Tr. 5187. For example, when a clinic operator was not present, Mr. Scheidler went to the clinic to meet with her, he left his card and wrote on the back of it two words, "Choose Life." Petitioners were not allowed to testify that the phrase was from the Bible[2] and was used

[2] In a major address on the peace process in the Middle East, President Bush used the same, unadorned biblical citation: "Choose

(Continued on following page)

to encourage respect for all human life. Tr. 1489. Neither were the petitioners allowed to present counter-contextual evidence in rebuttal. This is the record upon which the court of appeals fashioned its novel claim that proof of extortion under the Hobbs Act does not require a showing of "obtaining property" in any sense remotely like what the common law of extortion has traditionally meant. We turn now to a discussion of the relevant legal history surrounding extortion.

B. **The novelty of divorcing "obtaining of property" from the crime of extortion.** The second question presented asks "Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce 'by robbery or extortion' – and which defines 'extortion' as 'the *obtaining* of *property* from another, with [the owner's] consent,' where such consent is 'induced by the wrongful use of actual or threatened force, violence, or fear' (18 U.S.C. §1951(b)(2) (emphasis added))" may be applied to the petitioners on the record in this case or to the amici, who have often engaged in social protest on a variety of matters of public concern, but who have never done so to *obtain property* from those against whom they were protesting.

The view of extortion advanced by the court of appeals, Pet. App. 28a-29a, represents a serious departure from this Court's explicit teaching in *United States v. Enmons*, 410 U.S. 396, 400 (1973) (reversing Hobbs Act convictions of labor union officials and members who had engaged in acts of physical violence and destruction of

life." Remarks on the Middle East, 38 Weekly Comp. Pres. Doc. 1091 (June 24, 2002). The author of the words is Moses; the context of his well-known sermon to the people of Israel is as follows: "I call heaven and earth to witness against you today that I have set before you life and death, blessings and curses. Choose life so that you and your descendants may live, loving the LORD your God, obeying him, and holding fast to him; for that means life to you and length of days, so that you may live in the land that the LORD swore to give to your ancestors, to Abraham, to Isaac, and to Jacob." (Deuteronomy 30:18-20).

property during a campaign to induce an employer to agree to a union contract, because they had acted to further "legitimate union objectives, such as higher wages in return for genuine services"). Second, it is not a view that commands broad respect in other circuits, *see, e.g.*, *United States v. Panaro*, 266 F.3d 939, 948 (9th Cir. 2001), and *United States v. Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958). Third, the view of extortion announced by the court of appeals has no basis whatever in the long history of this crime. As we show next, the court did not discover its view of extortion in the prior history of this crime, but literally made it up out of whole cloth.

C. **The History of the Crime of Extortion.** The notion that a loss of business opportunity constitutes extortion is completely groundless. Chaos would ensue if this notion were taken seriously in commercial litigation. Every dispute involving a hard bargain in which there is a winner and a loser could descend into years of RICO battles simply by calling the outcome of the transaction "extortion."

Amici cannot stress with sufficient emphasis their sober judgment arising from decades of their involvement in social activism in this country that severe damage would be done to civil liberties if RICO is added to the arsenal of weapons that may be employed against social activists who protest about unpopular causes. The decision of the court of appeals represents a radical and tragic departure from a long series of cases (none of which were even discussed by the courts below) in which this Court has held repeatedly that picketing is legal – within certain restraints -- even though it manifestly has the purpose and effect of inflicting economic injury upon the target of the picket. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971) (claim that expression was intended to have coercive impact does not remove it from reach of First Amendment). This tradition is grounded in the recognition that peaceful picketing and leafleting are expressive conduct "of the highest order," *United States v. Grace*, 461 U.S. 171, 176-78 (1984) (picketing permitted in perimeter of Supreme Court). As this Court taught,

"Speech does not lose its protected character simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982); *see also Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) (since one of the functions of free speech is "to invite dispute," it may "best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger"). There are, in short, constitutional restraints even upon the idea of coercion. In addition, there are important historical reasons for differentiating coercion from extortion.

The place to begin the inquiry on extortion is with the common law, for this Court has repeatedly taught that a statutory term is generally presumed to have its common law meaning, *See, e.g., Taylor v. United States*, 495 U.S. 575, 592 (1990) (burglary); *United States v. Turley*, 352 U.S. 407 (1957) (stealing); *Perrin v. United States*, 444 U.S. 37, 45 (1979) (bribery); *Bell v. United States*, 462 U.S. 356, 362 (1983) (robbery). In *United States v. Nardello*, 393 U.S. 286, 289-96 (1969), the Court expressly applied this teaching to the definition of extortion. In *Morrisette v. United States*, 342 U.S. 246 (1952), the Court wrote: "where Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Id.* at 263. This "cluster of ideas" has been explored in great detail by careful scholars. *See, e.g.*, G. Robert Blakey and Kevin P. Roddy, "Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO," 33 Am. Crim. L. Rev. 1345, 1657-76 (1996); James Lindgren, "The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act," 35 UCLA L. Rev. 815 (1988); Brian Murray, "Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms," 75 Notre Dame L. Rev. 691, 702-22 (1999).

In all of the major treatises on the common law, there is unanimity in the definition of extortion as a *property* offense. *See* 4 William Blackstone, *Commentaries on the Laws of England* 141 (1765); 3 Edward Coke, *First*

Institute 584 (J. Thomas ed. 1826); William Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788). The court of appeals ignored the explicit teaching of this Court in *Nardello*, *supra*, and fashioned its own understanding of extortion that is manifestly at odds with the common law understanding of the crime, which required a *taking of property by the offender,* not a mere *deprivation or loss of business opportunity by the victim*. This point is clear in both the plain language of the Hobbs Act, and in the New York Field Code upon which it was based. *See Evans v. United States*, 504 U.S. 255, 261-63 (1992); *Carter v. United States*, 530 U.S. 255, 266 (2000).

The Model Penal Code[3] maintains the distinction between the common law offense of extortion and the subsequent statutory crime of coercion, which was unknown to the common law; *see, e.g., State v. Ullman*, 5 Minn. 1, 2 (1861). Section 223.4 of the Model Penal Code "deals with situations where threat ... is the method employed *to deprive the victim of his property.*" American Law Institute, Model Penal Code §223.4 at 201 (1980) (emphasis added). A distinct section "prohibits specified categories of threat made with the purpose of unlawfully restricting another's freedom of action to his detriment." *Id.*, §212.5 at 264. Many states follow the Model Penal Code by categorizing extortion and coercion as distinct statutory offenses; *see* Blakey & Roddy, "Reflections on Reves," 33 Am. Crim. L. Rev. 1345, at 1660 n. 25. A second group of states recognizes only the crime of extortion, not coercion. *Id.*, note 26. However the states handle the distinction between extortion and coercion, it is not a trivial distinction: "it is of the essence of extortion – not

[3] "The Model Penal Code has become ... the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes.... The success of the Model Penal Code has been shining. Largely under its influence, well over half the states have adopted revised penal codes." Sandford Kadish, "The Model Penal Code's Historical Antecedents," 19 Rutgers L. J. 521, 538 (1988).

only in New York, but more importantly, in the law generally – that one compel another to surrender property." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1132 (1992) (distinguishing extortion and coercion); *see also Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 231-32 (S.D.N.Y. 1992) (coercion not among laws providing a basis for RICO liability).

Under the constant teaching of this Court in the cases cited above – *Bell, Nardello, Perrin, Taylor* and *Turley* – the court of appeals was required to preserve the distinction between coercion and extortion. Instead, it radically rewrote the definition of extortion and held the petitioners liable for extortion when the record supports only a finding that owners of some abortion clinics lost an opportunity to do business when the petitioners dissuaded potential clients from having an abortion.

If the common law understanding of extortion is to be altered, this Court has taught that innovation of this sort is for Congress to undertake, not the federal courts. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989); and *see* cases cited in Blakey & Roddy, "Reflections on Reves," *supra*, 33 Am. Crim. L. Rev. 1345, at 1661, n. 31.

Distinctions matter in criminal law. The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or may even be thought immoral. But to view them as involved in the commission of the crime of extortion as an aider or abettor confounds the policy embodied in the prohibition. This record is replete with mistakes that obliterate the line between criminal and innocent conduct. For example, under the respondents' theory of the case, PLAN is a "criminal enterprise," described in the pleadings as "an association of individuals and groups with the common purpose of using racketeering activity to drive all clinics that provide abortion services out of business" (Third Amended Complaint, ¶ 83, S. App. 350). Included with the scope of the respondents' definition of "persons associated with PLAN" were organizers or featured speakers at

PLAN conventions. One of PLAN's featured speakers was Dr. William Allen, Chairman of the United States Civil Rights Commission. Tr. 2858. According to the respondents, mere attendance at one of the annual meetings of PLAN is a "predicate racketeering act." Third Amended Complaint, ¶ 87B, S. App. 351. At trial, respondents cast an even wider dragnet that snared *all abortion protesters* as "persons associated with PLAN." Thus the petitioners were held responsible for activities of other persons, known or unknown, authorized or not, even where the petitioners opposed such activities. Tr. 4781.

Mistakes of this sort at the trial were compounded by the court of appeals, which committed reversible error when it blurred the distinction between extortion and coercion in defining a violation of the Hobbs Act. Extortion should be left in its common law mold. If not, then the change should be made by the legislature.

II. If the novel theory of extortion adopted by the court of appeals were the law of the land at any earlier period of our history, it would have been a major impediment to all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation.

A. **Conflict over Fundamental Freedoms**. Any serious student of American history is aware that the struggle to secure the freedoms we deem to be natural rights, not gifts of the government,[4] has been deeply conflictual. *See, e.g.,* Howard Zinn, *A People's History of the United States* (1999). This theme of conflict over basic

[4] "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." Declaration of Independence, 1 Stat. 1 (1776); *see also* Virginia Declaration of Rights (June 1776).

values recurs in every generation from the founding moment to the present, from the Boston Tea Party through antiwar protests (notably during the Mexican-American War, the Civil War, World War I, World War II, and the Vietnam War, and in response to the ongoing presence of weapons of mass destruction), to the most recent demonstrations against the New Economic Forum and the global order that it represents. Thus the controversy over abortion is by no means the first volatile issue in the nation.

America is a nation with both a strong respect for the civilizing force of law and a healthy regard for the moral limits on law itself acknowledged in the tradition of civil disobedience, including episodes of confrontation with authority, that can be found in virtually every period of American history. *See, e.g.*, David Weber, ed., *Civil Disobedience in America: A Documentary History* 185-88 (1978); Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971); and Edward Madden, *Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy* (1968). Social protest has been expressed in nearly every decade of American history on a wide variety of subjects. We focus the discussion on two aspects of our constitutional history: racial equality and gender equality.

B. **The Effect of an Expansive Reading of Extortion on the Elimination of Slavery and Racial Discrimination.** If the view of the court of appeals described above had been the law of the land during the period of American slavery and Jim Crow, the overcoming of those twin evils would have been postponed for much longer than the time actually needed to do so.

As Justice Marshall reminded us during the Bicentennial of our Constitution, not everything about this country's past – including slavery and Jim Crow segregation – is cause for rejoicing. Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 26 Valparaiso U. L. Rev. 21 (1991).

In recent times we frequently compared ourselves favorably to totalitarian regimes of the Left and the Right

that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We take some pride in the way we have respected the strong voice of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been a lot easier to recognize the value of social protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

Nearly everyone in America would now regard the eradication of the slavery system as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the rigid mindset of the slaveholders who would brook no compromise on the matter of slavery as an "inalienable property right" bound up in their minds with an intractable position on state sovereignty. *See, e.g.*, Draft of the South Carolina Exposition (1828), in 6 *The Works of John C. Calhoun* 35-45 (1855); Fort Hill Address (1831), *id.* at 60-61; South Carolina Ordinance of Nullification (1832), 1 S.C. Statutes at Large 329 (1832); Const. of the Confederate States of America, Preamble.

Whatever the possible outcome of alternative hypothetical scenarios, the abolitionists pressed groundbreaking ideas. The most famous of the abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and publicly asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity, injustice and

absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD" (emphasis in original), as cited in Louis Ruchames, ed., *The Abolitionists: A Collection of Their Writings* 31 (1963).

Garrison served as President of the American Anti-Slavery Society from 1843 to 1865. On July 4, 1854, he told a mass meeting of over 10,000 abolitionists in Framingham, Massachusetts: "We have degenerated in our reverence for the higher law of God." *See* Philip S. Paludan, *A Covenant with Death: The Constitution, Law and Equality* 2-3 (1975); John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., *Religious Freedom* 263-64 (2001). Garrison then burned a copy of the Fugitive Slave Act of 1850. Echoing the covenant renewal ceremonies in ancient Israel, Garrison stated: "And let the people say Amen" (*see, e.g.*, Deut. 27). The people did. Garrison then set fire to a copy of the order of a federal court in Boston that Anthony Burns – a black Baptist preacher who had escaped from his master in Richmond – be returned to his "legal owner." Again Garrison cited Moses: "And let the people say Amen." They did. Garrison then held up a copy of the Constitution, which he denounced as "the parent of all other atrocities." Citing the prophet Isaiah (Is. 28:15), he called the Constitution with its compromise on slavery "a covenant with death, a compact with hell." As he burned the Constitution, he shouted out: "So perish all compromises with tyranny! And let all the people say Amen." Again the large crowd roared out their assent in the single biblical word "Amen."

Under modern precedents, activity of that sort would probably be deemed protected. *See Texas v. Johnson*, 491 U.S. 397 (1989) (burning of American flag protected); *but see United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card not protected). Whether under modern precedents the conduct of the abolitionists would be regarded as protected or unprotected expression, the relevance of these events to this case is clear. No one – not even Garrison's most critical opponents – imagined that

protest activity of this sort fell within the law of extortion, even though the net effect of such protest was to reduce the economic value of the slaveowners' "property" claim to "chattels personal." *See, e.g.,* Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (2d ed. 1974). The abolitionists radically challenged the very idea of owning a human being, and thus never "obtained" the property of the slaveholders. For this reason alone, the abolitionists were no more guilty of extortion for their protest against slavery than the petitioners are for their protest against abortion.

Less famous abolitionists may have been more effective in moving the hearts of their countrymen, but Garrison and the abolitionists were ultimately heard. As Garrison accurately predicted in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT" (emphasis in original), as cited in Ruchames, ed., *The Abolitionists, supra* at 31. Although not all of the acts of the abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law.

Women played a leading role in the abolitionist movement. Susan B. Anthony is now featured on the most valuable of our coins and is rightly remembered as the principal advocate for the enfranchisement of women, discussed below. She was also an agent of the American Anti-Slavery Society. In this capacity she urged an audience before the Civil War to "overthrow this government, commit its blood-stained Constitution to the flames, blot out every vestige of that guilty bargain of the father." As cited in Alma Luz, "Susan Brownell Anthony," in 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (Edward James ed. 1971). Lucretia Mott and the Grimké sisters were other notable feminists who were uncompromising on the abolition of slavery. *See, e.g.*, the letter of Angelina E. Grimké to Catherine E. Beecher, June 12, 1837 (fundamental principle of abolitionists is that "every slave-holder is a man-stealer") and June 17, 1837 ("all laws which sustain the system of slavery are unjust and oppressive – contrary to the fundamental principles of

morality, and therefore, null and void") as cited in Hugh Hawkins, ed., *The Abolitionists: Immediatism and the Question of Means* 41-50 (1964)

Women such as Lucretia Mott and Sojourner Truth played a powerful role in the operation of the "Underground Railroad" assisted slaves to flee from their masters, *see, e.g.,* Edward McGlynn Gaffney, "Politics Without Brackets on Religious Convictions," 64 Tulane L. Rev. 1143, 1160 (1990). This conduct was a direct challenge to the Fugitive Slave Act and to the jurisprudence that arose under it. *See, e.g., Sim's Case*, 61 Mass. (7 Cushing) 285 (1851); *see* Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975). Sometimes abolitionists engaged in dramatic "rescues" of slaves from the very courtrooms where their extradition hearings under the Fugitive Slave Act were being held, *see* Aviam Soifer, "Status, Contract, and Promises Unkept," 96 Yale L. J. 1916, 1919 (1987), and Stephen Campbell, *The Slave Catchers* 149 (1968). The abolitionists suffered violence for their views both from private parties and from the government. But no prosecutor in the nineteenth century ever thought to charge one of them with extortion, because none of the abolitionists ever obtained the dubious "property" that the Constitution and several federal and state statutes then deemed legal. *See, e.g., Dred Scott v. Sandford*, 60 U.S. 393 (1856) (ruling that an African slave was not a citizen with "social, civil, or political rights," but was "property to be used in subserviency to the interest, the convenience, or the will of his owner").

After the Civil War the Nation experienced a powerful movement to rebuild or reconstruct our constitutional order, ridding it of the racial injustice that had marred it from the outset. For a variety of reasons, mainly ignoble, this movement was aborted as part of the Compromise of 1877. *See, e.g.*, Eric Foner, *Reconstruction, America's Unfinished Revolution 1863-1877* (1988); Edward McGlynn Gaffney, Jr., "History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court," 25 Cath. U. L. Rev. 207 (1976). Over a century after these events, however, we are now committed more

than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the Radical Republicans and their moral progenitors, the abolitionists. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

The Jim Crow system was as iniquitous at its core as it was violent in the pattern of enforcement by the government at the state and local levels. *See, e.g.*, C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974). In the face of such systemic violence imbedded in the law, the Civil Rights Movement was remarkable precisely for the commitment of its leaders, principally Dr. Martin Luther King, Jr., to Gandhian nonviolence. But as Dr. King made clear in his famous Letter from Birmingham Jail, nonviolence did not mean obeying unjust laws. On the contrary, King and his followers in the Southern Christian Leadership Conference frequently challenged the brutality of the existing legal order. *See, e.g.*, Taylor Branch, *Parting the Waters* (1988) (use of tactics of civil disobedience similar to those used by the petitioners in this case).

Amici note that – as in the period of abolitionism – the violence surrounding civil disobedience in the era of the Civil Rights Movement was committed primarily not by the protesters, but against them by their adversaries or by the police. Bull Connor undoubtedly thought he was preserving the peace against lawless agitators in Birmingham, but most of America saw the violence in the bared teeth of his dogs.

Memorable uses of civil disobedience in the era of the modern Civil Rights Movement included the efforts of the freedom riders and of the people who "sat in" places of public accommodation that were segregated on the basis of race. Were the freedom riders federal racketeers? President Kennedy certainly did not think so when he ordered the Justice Department to protect them, even if they caused Greyhound to lose some business because of their activities. Or were the sit-in demonstrators federal racketeers? After all, they caused Woolworth's and other

restaurants that observed the Jim Crow laws to miss a lot of opportunities to sell hamburgers and fries. Or were Rosa Parks and those who joined her in the famous Montgomery bus boycott extortionists? *See* Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* (1958). They, too, caused a diminution in the coffers of the municipal bus company that followed the Jim Crow law.

The line between Martin Luther King, Jr., and violent criminals, between freedom riders and Mafiosi, should not be difficult to discern. The loose definition of extortion adopted by the court of appeals has blurred that line and has imperiled social activists of a wide variety of sorts in this country.

In some cases this Court overturned convictions of the sit-in demonstrators for breach of the peace or for trespass under state law, perhaps for the reason that the Court could no longer countenance the underlying state legislation requiring Jim Crow segregation, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966).[5] In other instances the Court declined to reverse criminal convictions of protestors under state law, pointing to other dimensions of the facts, such as the integrity of the state courthouse or a State jailhouse. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). No matter which way these cases turned, the inescapable fact is that civil rights activists engaged in acts of civil disobedience that would have been seriously impeded if the novel view of extortion adopted by the court of appeals had been the law of the land at that time.

The nation is now better off because of the movements to abolish slavery and to end Jim Crow law. Both of these

---

[5] In a series of "sit-in" cases brought before the enactment of Title II of the Civil Rights Act of 1964, the Court declined to hold expressly that the Jim Crow laws were themselves unconstitutional, but found an alternative ground on which to reverse the State law conviction. *See, e.g., Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964).

movements faced steep opposition from those who wished to maintain the status quo. The opponents of these movements could easily have crushed the protesters if the theory of extortion adopted by the court of appeals had been available to them during these conflicted periods of American history.

The district court acknowledged the relevance of this period of history to this case, which he agreed was "analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience." Pet. App. 73a, *see also* Tr. 4339-40. But Judge Coar curiously concluded that the analogy with the sit-ins and the refusal to move to the back of the bus "works in [respondents'] favor" because those protesters were "arrested, jailed, and otherwise punished." Pet. App. 73a. No one would seriously maintain that Martin Luther King, Jr., or his colleagues in the SCLC, were the sort of "racketeer" that Congress had in mind when it enacted RICO. Judge Coar ignored the major disparity between the sentence for trespassing under state law (a fine and perhaps a week in jail) and for extortion under the Hobbs Act (up to twenty years in prison).

Although the Court has declined to address the third question explicitly addressing *Claiborne Hardware*, the First Amendment overtones of this case are preserved in the second question and are worthy of the Court's attention. We discuss them briefly in Part III below.

C. **The Effect of an Expansive Reading of Extortion on the Elimination of Gender Discrimination.** If the view of the court of appeals had been the law of the land during the period of feminist insistence upon full participation in the rights and obligations of citizenship, equal justice under law for women and men would have taken much longer than the two centuries it took to achieve.

Many scholars have noted strong parallels between the slavery system and the abusive treatment of women as "chattels personal" subject to the law of coverture imbedded in the common law, *see, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 430-33 (1765), and

enacted into law in this country by all-male legislatures and enforced by all-male courts. *See, e.g.*, James Kent, *Commentaries on American Law* (1826). Women wanted to participate in the franchise and in all of the obligations of citizenship from the very outset of the republic. They were excluded from doing so on the basis of the theory of virtual representation, the very theory that the revolutionaries used to reject the imperial rule of Great Britain over the American colonies. *See, e.g.*, Linda K. Kerner, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 3-33 (1998).

As with the struggle to abolish slavery and then to eradicate the legal structure of apartheid, the effort to change the inequality between men and women under the law of this land was a prolonged and intense controversy. The feminists of the nineteenth century may not be contained within rosy-tinted portraits.

Eight decades after the adoption of the Nineteenth Amendment we now take for granted that women should be able to vote. But advocacy of this view was never easy. For example, Susan B. Anthony challenged the legitimacy of the all-male franchise by voting in Rochester in 1872 before a constitutional amendment expressly allowed it. She was convicted of voting fraud after a member of this Court, Justice Ward Hunt, disallowed the introduction of exculpatory evidence and directed the jury to enter a verdict of guilt without any opportunity to reflect upon the evidence. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873). Such judicial misconduct is reminiscent of the egregious behavior of Justice Chase presiding over trials under the infamous Sedition Act of 1798. *See* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).

The transcript of Anthony's bold statement before her sentencing makes clear that she was prepared to risk not only violating the law as it then stood, but also to risk being found in contempt of court. Anthony continued to speak powerfully about the injustice of her conviction,

even though Justice Hunt demanded that Anthony sit down and be silent, warning her seven times to the effect that "The Court can not allow the prisoner to go on." After she finally sat down, the Court required her to stand up to hear her sentence, and she then told the Court: "May it please your honor, I shall never pay a dollar of your unjust penalty. . . . I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that 'Resistance to tyranny is obedience to God.'" David Weber, ed., *Civil Disobedience in America: A Documentary History* 185-88 (1978).

Anthony's views were ultimately vindicated by the enactment of the Thirteenth Amendment abolishing slavery and the Nineteenth Amendment enfranchising women. But the Thirteenth Amendment was ratified in 1865 only after the Civil War, and the Nineteenth Amendment was ratified in 1920 only after several further bold acts of public protest unmasking the "hypocrisy" of President Woodrow Wilson's commitment to wage war for democracy for males in Europe, but not to proceed peacefully within our constitutional processes to secure the franchise for females in America.

Like the abolitionists, the suffragists suffered violence for advocating their views. Dr. Alice Paul – founder of the Congressional Union for Woman Suffrage and the National Woman's Party, and author of the original Equal Rights Amendment – was arrested three times for her acts of nonviolent protest against the exclusion of women from the franchise. Paul waged a hunger strike in prison, was hospitalized, force-fed and treated as insane.

In 1913, Dr. Paul organized a famous parade in the nation's capital calling for the adoption of a constitutional amendment authorizing women's franchise. Women dressed in white were led by New York attorney Inez Milholand Boissevain, who was dressed like Joan of Arc on a white horse. At the end of the parade men pulled women off their horses, as police stood by smirking. A hundred people were hospitalized, but not a single man was arrested.

As with the abolitionists, the relevance of the suffragists to this case is simply that no one in the nineteenth or twentieth century imagined that the protest activity of these women was indictable as extortion, for none of these women ever *obtained the property* of those against whom they demonstrated. Just as acts of official violence against women did not end the struggle for women's suffrage, moreover, the contortion of the crime of extortion in this RICO action will not end the movement to surround unborn life with dignity. In both instances the violence by the government against peaceful protesters and the contortion of the racketeering law are unjustified.

As the court of appeals noted in the first phase of this litigation, women played a leading role in the temperance movement. *National Organization for Women v. Scheidler*, 968 F.2d 612, 620 (7th Cir. 1992). The acts of the three named petitioners complained of in this case pale in comparison to the militant tactics employed by famous nineteenth century feminists who led the temperance movement. In both settings the result was a loss of business opportunities by those against whom the activists protested. But the tactics of contemporary abortion protesters such as the petitioners are mild by comparison to protesters like Carry Nation, who applied constant moral pressure on owners of saloons to discontinue their sale of alcohol, and who were willing to disrupt their business by charging into saloons and destroying kegs of whiskey and beer with an ax. *See, e.g.*, Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* 50, 76-77, 197 (1985) (describing violence against protesters); Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Temperance Movement* (2d ed. 1986); Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime* (1972). Perhaps these protesters could have been prosecuted for destruction of property, but surely not for extortion. Precisely because they condemned the consumption of alcohol, they never obtained possession of the whiskey they rendered impotable.

The demonstrations and sit-ins occurring during the period while the ratification of the Equal Rights Amendment was being debated are reminiscent of those during the Civil Rights Movement. The golden rule suggests that the standards of tolerance applied to the respondents in the 1970s should also apply to the petitioners in the era of contestation over abortion. Equal justice under law requires the same result.

The abolitionists and those engaged in the modern Civil Rights Movement sometimes engaged in civil disobedience to help raise the awareness of the nation that the rule of law that countenanced slavery and then apartheid was intolerable. The feminists of the nineteenth century and those engaged in the modern movement for gender equality also engaged in civil disobedience from time to time to bear witness to the injustice of rules of law imposed upon women without their consent by all-male legislatures in which they had neither voice nor vote. If the novel view of extortion espoused by the court of appeals – equating loss of business opportunity with "obtaining property" – had been the law of the land in any of these eras, it would probably have taken much longer to achieve the prohibition of discrimination on the basis of race, color and gender contained in statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

This Court has been especially alert to the fragility of movements protesting against deprivations of liberty and equality. In *New York Times v. Sullivan*, 376 U.S. 264 (1964), the Court protected the assets not only of the country's most powerful newspaper, but also one of the weakest and most vulnerable movements of that era, which would not have survived if its political adversaries had been permitted to use state libel law to impose runaway monetary judgments against it. *See, e.g.*, Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991).

The Court should act now with no less solicitude to secure the freedom of expression on controversial matters to all classes of protesters without discrimination on the

basis of the content of their speech or the viewpoint they express. The Court should use this case to reinforce the limits on the use of civil RICO that Congress set in the very act of drawing up this statute. *See* Part III-C below. The unwillingness of Congress to apply RICO to social protest was informed by our nation's history. The court below ignored this history and the "central meaning of the First Amendment": the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S., at 270.

III. The draconian remedies of RICO – treble damages, prohibitive injunctions, and attorneys fees – were not intended by Congress to punish unpopular social protesters, whose civil disobedience may be punished adequately through other legal remedies.

A. **The Nationwide Injunction.** The first question presented in the petition for certiorari addresses the injunction issued by the district court. The parties and other amici address the issue of whether Congress intended RICO to confer upon the courts power to grant any injunction sought not by the government, but by private parties against other private parties. Amici do not discuss this issue at length, but simply note the dramatic intrusion upon protected speech manifest in the permanent injunction in this case, which the district court ordered throughout the country for a period of twelve years. Pet. App. 110a. Recognizing "that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity," Pet. App. 23a, the court of appeals nonetheless sustained this injunction because it found that none of the illegal conduct, including trespassing, is protected by the First Amendment. Pet. App. 24a-25a.

Make the subject of the protests in this record almost any other controversial matter – e.g., animal rights (*see* Tr. 4963, RICO "enterprise" could be "animal rights group

that bars entry to a restaurant that serves veal"), civil rights of gays, euthanasia, death penalty, human cloning, racial discrimination, use of Army personnel to train Latin American police in techniques of torture, or treatment of the homeless – and the stunning breadth (nationwide) and extended duration (twelve years) granted in this case against nonviolent protesters against abortion should ring alarm bells. *See* John Chong Yoo, "Who Measures the Chancellor's Foot?" 84 Calif. L. Rev. 1121 (1996).

If the courts have power to grant injunctions under these circumstances, it surely cannot be on the basis of a hidden preference for one approach to an intense controversy over another. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). The genius of the Free Speech Clause is that it bans discrimination by the government, including the courts, on the basis of subject matter of the speech or the viewpoint of the speaker. *See, e.g., Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

B. **The First Amendment Overtones of the Case.** The Court declined to addressed the third question presented in the petition for certiorari, but the impact of the First Amendment upon RICO is still before the Court in the form of the second question granted, which asks whether the Hobbs Act may fairly be read to criminalize "the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there." As we illustrated above in Part II, sit-ins and demonstrations form a core part of the expressive conduct that the First Amendment protects.

When this protracted litigation was last before this Court, two of the justices noted: "Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis." *National Organization for Women v. Scheidler*, 510 U.S. 249, 264

(1994) (Souter, J., concurring, joined by Kennedy, J.), citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *See also* Craig M. Bradley, "NOW v Scheidler: RICO Meets the First Amendment," 1994 Sup. Ct. Rev. 129, 151-67.

C. **The Misapplication of RICO to Social Protest.** The interpretation of RICO adopted by the court of appeals is not supported by the history surrounding the adoption of this statute. For a discussion of this history, *see* Brian Murray, "Protestors, Extortion, and Coercion," *supra*, 75 Notre Dame L. Rev. 691, at 697-99; and Robert Blakey & Kevin Roddy, "Reflections on Reves," *supra*, 33 Am. Crim. L. Rev. 1345, at 1665-75.

During the legislative process that produced RICO, several of the bill's opponents objected to its breadth, especially the possibility that RICO might be used against political protesters. Senate Bill 1861, a forerunner of the final statute, defined racketeering activity as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. §2(a) (1969); *see also* 115 Cong. Rec. 9569 (1969). Several objected to this language. For example, Senators Edward M. Kennedy and Philip A. Hart complained that the bill reached beyond "organized crime." S. Rep. No. 91-617, at 215 (1969). The American Civil Liberties Union also opposed the bill, expressing its concern that social and political protesters might fall within the bill's ambit, subjecting them to its draconian penalties. The ACLU found the breadth of the original definition of racketeering activity "particularly troublesome," citing the anti-war demonstrations at the Pentagon and at Columbia University. Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475-76 (1969) (statement of Lawrence Speiser, director of the Washington office of the ACLU). It feared that the first draft of the statute would be used by the Nixon Administration to suppress anti-war dissent. The Department of Justice also objected, arguing that the

definition of "racketeering activity" in the bill was "too broad and would result in a large number of unintended applications." S. Rep. No. 91-617, at 121-22. Deputy Attorney General Richard G. Kleindienst suggested an amendment to narrow the definition to a list of specific offenses "customarily invoked against organized crime." *Id.* at 158.

In response to these misgivings, the Senate Judiciary Committee eliminated the broad language defining "racketeering activity" as "danger of violence to life, limb or property," and replaced it with a list of designated federal and state offenses. The new language was virtually identical to that recommended by the Justice Department. The Senate adopted the revised bill by a vote of seventy-three to one. 116 Cong. Rec. 972 (1970). The House then made minor amendments with which the Senate concurred. *Id.* at 36,296. President Richard M. Nixon signed the bill into law on October 15, 1970.

With the narrowing of "racketeering activity" to specific predicate offenses, no one believed that RICO posed a threat to political protesters. Satisfied that the amended bill incorporated its proposed changes, the Justice Department made no further comment on RICO's breadth or the possibility of unintended application of the statute. Leading Senators and House members also united on the point that the bill was narrowly drafted to avoid treading on civil liberties. Senator John L. McClellan, RICO's chief sponsor, informed his colleagues in the Senate that RICO "offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce, while *posing no real threat to civil liberties*." 116 Cong. Rec. 18,941 (1970) (emphasis added). Representative Richard H. Poff, who sponsored the bill in the House of Representatives, stated that RICO "*does not violate the civil liberties of those who are not engaged in organized crime*, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime." *Id.* at 35,344. Senator Edward Kennedy raised a concern that the original bill might be construed to reach apply to someone like Dr. Benjamin Spock, a

pediatrician convicted for violation of the Selective Service Act after staging sit-ins at armed services recruiting centers, draft-card burnings, and other anti-war demonstrations. *See* 116 Cong. Rec. 845, 845-46 (1970); *see also United States v. Spock*, 416 F.2d 165, 168 n.2 (1st Cir. 1969). After a colloquy with Senator McClellan on the floor of the Senate, both Senator Kennedy and the principal sponsor of RICO agreed that the legislation would not reach political protest.

The application of RICO to the nonviolent actions of the three named petitioners is thus impossible to harmonize with the express and clear declaration of the intent of Congress that this statute should not be used as a blunderbuss to chill the protected speech and expressive conduct of social activists such as the petitioners.

D. **The Federalism Problem and the Danger of Overkill.** It is the function of the judiciary to say what the law is, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), but that does not mean that federal courts have permission to ignore the plain language of a federal statute or the clear intent of Congress to adhere to the views of the several states on the definition of a crime. In framing the Hobbs Act in 1946, Congress drew on and incorporated common law concepts on the law of extortion. According to Congressman Hobbs, "the definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11,900 (1945).

This deference by Congress to the role of the states in defining crimes is in keeping with the Tenth Amendment and is entitled to judicial respect. The major revision of the Hobbs Act effected by the court of appeals in this case not only disregards the clear intent of Congress to confine extortion to "obtaining of property" by the perpetrator. It also ignores the long history of extortion, *see* Part I-C above, and thus denigrates the role of the states in defining the law of crimes and of property.

The court of appeals reflects the assumption that federal courts have broad authority to redefine a federal statute in a manner that sets aside over two centuries of

reflection on extortion by the several states. This Court should not allow lower federal courts to construe federal statutes that are based on state law in a manner that erodes respect for the states in the task of defining crimes. Federal courts should not be allowed to reinvent the definition of extortion in the Hobbs Act as they go along and as they see fit, without any guidance from the legislatures or courts of the several states.

After the verdict below, the plaintiffs-respondents filed a Rule 15(b) motion in the district court, seeking to add a variety of claims arising under state tort law. This sort of expansion of RICO into an omnibus federal statute swallowing up garden-variety state tort claims is precisely what this Court rejected in *Beck v. Prupis*, 529 U.S. 494 (2000) (no cause of action where overt act in furtherance of RICO conspiracy is not an act of racketeering, but an ordinary state tort).

Adequate remedies exist in state law to punish those who employ civil disobedience as a means of challenging the current state of the law. For example, a person who trespasses upon private property is subject to the laws of the several states concerning trespass. And the recently enacted FACE law, 18 U.S.C. §248, provides further protection to owners of abortion clinics. These provisions make it unnecessary to add the draconian remedies of RICO – treble damages, prohibitive injunctions and attorneys fees – to the potent mix that may send a sub-zero blast against social activists on a wide variety of contentious issues in our society.

CONCLUSION

The Court of Appeals should be reversed.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.*
Valparaiso Univ. School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7860
Counsel of Record

WILLIAM W. BASSETT
Univ. of San Francisco
School of Law
San Francisco, CA 94117
415-422-6625

G. ROBERT BLAKEY
Notre Dame Law School
Notre Dame, IN 46556
219-531-5717

ANGELA C. CARMELLA
Seton Hall Univ.
School of Law
One Newark Center
Newark, NJ 07102
973-642-8843

JOSEPH MATTHIAS
COSGROVE, ESQ.
1460 Wyoming Avenue
Forty Fort, PA 18704
570-287-0921

ROBERT A. DESTRO
Catholic Univ. of America
Columbus School of Law
Washington, DC 20064
202-319-5140

MARIE A. FAILINGER
Hamline Univ.
School of Law
1536 Hewitt Avenue
St. Paul, MN 55104-1236
651-523-2124

MICHAEL J. PERRY
Wake Forest Univ.
School of Law
Winston-Salem, NC 27106
336-758-5457

VICTOR GREGORY ROSENBLUM
Northwestern Univ.
School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

GERALD F. UELMEN
Santa Clara Univ.
School of Law
500 El Camino Real
Santa Clara, CA 95053
408-554-5729

APPENDIX A

Statements of Interest of Amici Curiae Communities and Voluntary Associations

As noted in the text of the brief, amici are voluntary associations and individuals who engage in protest on a wide variety of issues. Because the Seamless Garment Network organized the participation of these amici in this brief, it is listed first.

Seamless Garment Network [SGN] is a coalition of groups and individuals committed to non-violence and respect for life. The network promotes the consistent life ethic, focusing on the connections among issues concerning human life, including war, abortion, poverty, racism, the arms race, the death penalty and euthanasia. SGN supports all means of non-violent change including, but not limited to, non-violent direct action, political and legislative action, and direct service to those suffering under these attacks on life. *Carol Crossed* (the former executive director of SGN), *Mary S. Rider* (the current executive director), and *Ruth Enero* (president of the Board of Directors) have frequently engaged in non-violent civil disobedience relating to the issues listed above. All three are married women and mothers of many children. If their political opponents were to use civil RICO against them, the loss of their homes, cars, and other valuable things they own would wreak havoc upon them and their families. Ms. Rider offered a declaration before the district court at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN]. This declaration challenged the enormous breadth of the nationwide injunction.

Agape is a community of faith in Franklin, Louisiana, that witnesses for peace and justice through nonviolence. It engages in education of its members and the public, especially on the death penalty, through publishing booklets, brochures, and treatises on how to effect change through raising public awareness and consciousness about issues of justice and peace.

Americans Disabled for Accessible Public Transit [ADAPT] is a national organization, most of whose members have severe disabilities and many of whom have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT members include persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, polio, amyotrophic lateral sclerosis, as well as many other disabilities. Most of these persons use assistive devices, including motorized and manual wheelchairs, ventilators, and personal assistance services for meeting their personal needs. ADAPT's national mission is to establish the civil rights of all individuals to choose to live in their homes and communities, rather than be forced into nursing homes and other institutional settings. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans with Disabilities Act, 42 U.S.C. Sec. 12101 et seq. ("ADA"). See *ADAPT v. Skinner*, 867 F.2d 1471, 881 F.2d 1184 (3d Cir. 1989).

Carolina Interfaith Task Force on Central America [CITCA] is a voluntary association of persons who believe in non-violent direct action on issues relating to peace and

justice in Central America. CITCA notes that all citizens of the United States have the right to express their views on controversial matters in a non-violent fashion. This right is jeopardized when the courts of the United States government are to prosecute citizens for exercising rights that are fundamental parts of the Bill of Rights.

Catholic Peace Fellowship [CPF] is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in non-violent civil disobedience of laws and policies inimical to peace in today's world.

Center for Action and Contemplation is a Christian center forwarding the integration of social action and contemplative prayer. The members of this community regularly engage in transforming society around the issues of poverty, war, and other kinds of violence.

Center for Peace Studies at Georgetown University engages in education about historical figures, like Dr. Martin Luther King, Jr, Mohandas Gandhi, Thomas Merton and their message of how to achieve peace through "creative tension," "disturbing a negative peace," and "consciousness raising."

Citizens United for Alternatives to the Death Penalty [CUADP] is a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. CUADP takes no position on the abortion issue. It does not endorse or support the

stand of these defendants on that issue, nor does it necessarily approve of their tactics or actions. It supports the defendants' appeal to the U.S. Supreme Court strictly as a legal matter, urging the Justices that "peaceable, non-violent direct action" – that is, peaceful civil resistance which "crosses the line" and may involve sit-ins or blocking access that "interfere" with somebody's legal "rights" – should not be held to constitute the federal felony crime of "extortion." Nor should a "pattern" of such "direct action" be condemned as "racketeering."

The Conference of Major Superiors of Men serves the leadership of Catholic orders of over 25,000 vowed religious priests and brothers in the United States. The Justice and Peace Division provides a voice for these communities throughout society in witnessing against capital punishment, war, poverty, and any issue that threatens life. The civil rights of free speech and assembly are crucial to effective action against oppression. These civil rights are threatened by the use of the federal racketeering statute against political and religious dissenters.

Dorothy Day Catholic Worker House [DDCW] in Washington, D.C. is a community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, the community sponsors a weekly vigil for peace at the Pentagon as well as numerous other demonstrations against war and militarism, poverty and abortion. Other communities in the Catholic Worker network signing this brief include: the

Casa Juan Diego (Houston, Texas); the *Day House* (Detroit, Michigan); *Ithaca, New York Catholic Worker*; the *Los Angeles Catholic Worker*; *Mary's House* (Birmingham, Alabama); *St. Francis Catholic Worker Community* (Columbia, Missouri); *St. Francis and Therese Catholic Worker House* (Worcester, Massachusetts); and the *St. Joseph House of Hospitality* (Rochester, New York).

The Staff of the *Eighth Day Center for Justice* is composed of Catholic sisters, priests, and laity who believe that non-violent direct action is the backbone of our democracy and the core of the Christian message. For example, some of the healing actions of Jesus on the Sabbath were viewed as a violation of the Torah. Religiously motivated opposition to unjust laws has a long and admirable history, culminating in the Civil Rights Movement and the Movement for Gender Equality in this country, and in the opposition to the assault upon human life in the Nazi regime.

Embrace a Consistent Ethic participates in ongoing peaceful public witness against all forms of taking human life, including opposition to war, capital punishment, euthanasia, abortion, racism and poverty. The members of this community believe that the *NOW vs. Scheidler* litigation interferes with the ability to carry out group/individual conscientious objection, even those actions which would normally be considered within the limits of free speech.

Every Church a Peace Church [ECPC] is an association of churches that adopt non-violent struggle as their way to pursue justice. For this reason ECPC agrees with the brief filed in this case by the Southern Christian Leadership Conference in the court of appeals that the

power to impose treble damage awards upon the petitioners and to enter a nationwide injunction under RICO represents "clear and present danger to future prospects for the lawful exercise of our liberties, namely, the free exercise of religion, speech, press, or assembly and petition for redress of grievances." ECPC will be neither embarrassed nor deterred if we discover one day that our church members are filling the courts, and even the jails, for the free exercise of their religion in face of this regressive judicial ruling.

The Faith Community of St. Sabina's in Chicago is a Word-based, Bible teaching church that believes in the power of praise and worship – a spiritual hospital where all are welcome and invited to "taste and see the goodness of the Lord." The members of the Faith Community of St. Sabina's believe that the church is called to be the immune system of the world – fighting off the attacks of Satan, by both prayer and peaceable non-violent direct action. Thus St. Sabina's has crusaded against a host of social evils including, among other: crime, drugs, abandoned property, the planned marketing of high-alcohol malt liquor in the African-American community, fare hikes and service cuts by mass transit, "witch-hunt" tactics against Black males by suburban police forces, advertising of alcohol and tobacco products on public transportation, and glorification of acts of physical violence on television, especially on shows such as the Jerry Springer TV program."

Feminists for Life of America [FFLA] was established in 1972. FFLA is a nonsectarian, nonpartisan, grassroots organization that seeks equality for all human beings and champions the needs of women. FFLA opposes all forms of violence including abortion, infanticide, child abuse,

domestic violence, assisted suicide, euthanasia and capital punishment, and the exploitation of women and children, as they are inconsistent with the core feminist principles of justice, nonviolence and nondiscrimination.

Feminists for Life of New York is a pro-woman, pro-life organization that advocates for change for women and their children. Some of its members engage in civil disobedience. In the twelve years since its inception, members have worn costumes of the early suffragists, stationing themselves outside of convention centers and libraries, to call attention to issues such as domestic violence, child abuse, and child welfare rights. Like Susan B. Anthony, they have worn gags on their mouths to protest the silencing of women's voices. They participate in a vigil at the Hall of Justice on every second Friday of the month to protest the death penalty.

Franciscan Office of Justice, Peace, and the Integrity of Creation, Santa Barbara Province, practices outreach, advocacy, and education with and on behalf of the friars and those with whom they minister.

The Fund for Animals, founded in 1967 by author and humanitarian Cleveland Amory, seeks to protect wildlife and domestic animals through both advocacy and animal care. The Fund produces educational materials and provides information and interviews to the media in order to help raise public awareness about animal cruelty. The group also works for passage of animal protection legislation, pursues legal action against those who do not abide by those laws, and provides hands-on care to thousands of animals nationwide. Members of the Fund have also

employed peaceful direct action to help curtail sport hunting and commercial trapping.

Nevada Desert Experience has since 1983 organized non-violent civil disobedience at the U.S. nuclear test site in Mercury, Nevada, where tens of thousands of people – including the actor Martin Sheen – have been arrested for trespass in their public protest against weapons of mass destruction.

Not Dead Yet is a national grassroots organization of people with disabilities formed to oppose legalization of assisted suicide and euthanasia, and to bring a disability-rights perspective to the legal and sociological debate around euthanasia and physician assisted suicide. Formed in 1996 in Illinois, Not Dead Yet has worked to educate, support, coordinate and lead the disability community's effort to stop the "right to die" from becoming a duty to die or a right to kill. Not Dead Yet's amicus brief, filed in the U.S. Supreme Court in the case of *Vacco v. Quill,* 117 S.Ct. 2293 (1997), was among a handful out of over 60 such briefs cited by the Court in its final opinion. Not Dead Yet has given invited testimony before U.S. Congressional committees three times. Members have also engaged in non-violent direct action, such as a rally outside the U.S. Supreme Court in January, 1997, and in civil disobedience for which members, most of whom use wheelchairs, have been arrested on misdemeanor charges, such as trespass for a sit-in at the corporate headquarters of the Hemlock Society, and disturbing the peace for protest actions at a conference of the World Federation of Right To Die Societies.

The Orthodox Peace Fellowship in North America is a community of Eastern Orthodox Christians committed to

witnessing for peace in our world: Eastern Orthodox Christianity has for 2000 years affirmed the Sacredness of human life from conception to death. This, we understand, is the faith of Christ, the apostles, the councils, and the fathers and mothers of the Church. This we must proclaim.

Pax Christi USA is the national Catholic peace movement of 14,000 members who are committed to the gospel imperative of seeking peace through nonviolence. The members of this association promote peace through personal and social transformation. They frequently engage in non-violent protest of policies that undermine peace and justice.

The Peter Maurin Center in Washington, D.C. was established in 1997. In the words of Peter Maurin, the center seeks to contribute to creating a "society where it is easier to be good." The Center does so in three ways: (1) evangelization in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distributes it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and specifically to rid themselves of the Navy at Vieques; and (4) through work for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal. The Center is concerned with the broad and elastic application of the RICO act to dissent and non-violent protest. The misapplication of the law in this way permits the government to single out and criminalize movements for social change virtually at will. Affording the government power of this nature renders

democratic practices timid and superficial and essentially disempowers the People in the political process. To protect popular, and especially unpopular, political expression, these effects of the RICO law need to be nullified.

Plowshares is a coalition of religious believers who seek to enflesh the words of the prophet Isaiah 2:4, "They shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not take up sword against nation and neither shall they study war anymore." The founders of this movement, Fr. Daniel Berrigan, S.J., his brother, Philip Berrigan, and Philip's wife, Elizabeth McAlister, were leaders in the opposition to the Vietnam War. From burning draft files to organizing larger civil disobedience actions, they provided the peace movement with a keen focus. Their actions against militarism and the nuclear arms race continue today. Fr. Berrigan offered a declaration before the district court at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN]. This declaration addresses the severe impact on non-violent social protest that flows from treating loose associations of antiwar protesters as though they were racketeer-influenced corrupt organizations. The Berrigan brothers and Ms. McAlister join this brief in their individual capacities, as do the following Plowshares Activists: John Dear, S.J., Peter DeMott, Bruce Friedrich, Ellen Grady, Art Laffin, Paul Magno, Anne Montgomery, Patrick O'Neill, and Kathy Boylan Shields. Fr. Dear's writings focus on nonviolence and peacemaking. His book, *Peacemaking Behind Bars*, is an account of his time spent in jail for a 1993 action at Seymour Johnson Air Force Base in Goldsboro, N.C. He has participated in many other actions of non-violent civil disobedience for justice and

peace. All of these activists have spent many years imprisoned for their non-violent protest against war.

Sojourners is a Christian ministry whose mission is to proclaim and practice the biblical call to integrate spiritual renewal and social justice. In response to this call, the members of this community offer a vision for faith in public life by: publishing *Sojourners* magazine, and other resources that address issues of faith, politics, and culture from a biblical perspective; preaching, teaching, organizing, and public witness; nurturing community by people from the various traditions and streams of the church; supporting the work of the Sojourners Neighborhood Center in Washington, D.C.; hosting an annual program of voluntary service for education, ministry, and discipleship. Members of Sojourners seek to be guided in their lives and work by the biblical principles of justice, mercy, and humility.

Vieques Support Committee is an organization that has helped to organize civil disobedience to protest the repeated bombing of Vieques Island in Puerto Rico by the United States Navy.

Voices in the Wilderness is a group that seeks to end the economic sanctions against the people of Iraq. The group sends delegations to Iraq to break the siege and bring desperately needed medical supplies to children and families. It has also sponsored demonstrations against the ongoing sanctions, including week-long fasting outside the headquarters of the United Nations in New York.

Witnesses for Reconciliation was formerly the Committee of Southern Churchmen that was founded in the 1960's to promote the work and vision of Dr. Martin Luther King,

Jr., and to advance his cause of nonviolence. The Committee promoted, participated in, and led marches, sit-ins, boycotts, and the freedom rides. Today it is small but continues to advance the cause of civil and political rights for minorities.

Individuals

David Atwood is the director of the Texas Coalition to Abolish the Death Penalty. This group regularly organizes demonstrations against the death penalty in Texas.

Donald Bauer is a Catholic priest who served as a member of the New York State Labor and Religion Coalition since its inception, and who worked tirelessly for farmworker wage equity and other issues on behalf of the poor. He also was appointed to the Congress on Racial Equality and in both of these capacities used public witness to educate and challenge the public.

Michael Baxter, C.S.C. is a theology professor at the University of Notre Dame, and the national president of the Catholic Peace Fellowship.

Wendell Berry is an author, farmer, English professor, and poet. As a long-time conservationist and small farm advocate, he has written many books deploring the loss of family farms and rural jobs to farm factories. He is the recipient of many awards, including the Lyndhurst Foundation Prize and the Jean Stein Award from the American Academy of Arts and Letters.

Abe Bonowitz is the director of Citizens United for Alternatives to the Death Penalty [CUADP], a national organization that works to end the death penalty in the United States through aggressive campaigns of public

education and the promotion of tactical grassroots activism. On occasion he has engaged in peaceful acts of civil resistance. While CUADP takes no position on the abortion issue, Bonowitz is pro-choice and, therefore, he is in profound disagreement with the petitioners on that issue and deplores the violent tactics that abortion opponents have been known to employ. He does not know these petitioners and has no personal knowledge of their tactics. He is informed, though, that jurors at the trial of this case found petitioners or unidentified persons "associated with" them responsible for four acts or threats against persons or property. He supports this appeal only because, as a legal matter, political protest involving sit-ins or blocking access should not be condemned as "extortion" or "racketeering."

Roy Bourgeois, M.M., is a Maryknoll priest who, after years as a foreign missionary in Central America, founded the School of the Americas Watch [SOAW], a loose coalition of citizens concerned about the widespread abuse of human rights – including torture and murder of religious leaders and labor leaders throughout Central and South America – by foreign military officers who study at the U.S. Army School of the Americas at Ft. Benning, Georgia. Each November – on the anniversary of the assassination of seven Jesuit priests and their domestic workers in San Salvador by graduates of the School of the Americas – SOAW organizes a major demonstration at Ft. Benning against the negative effects of this program upon peace and justice in our hemisphere.

Bernard Broussard is the founder of the *Human Relations Council of Louisiana*, a group that played a leading role in community organization on behalf of the civil rights of African Americans in Louisiana in the mid

1960s. From that time to the present, he continues to challenge through marches, demonstrations, holding prayer meetings on behalf of the oppressed in the South. He is a founder of *Starthrowers*, a human rights organization based in Louisiana.

Will Davis Campbell is a writer, lecturer, and long time supporter of the Civil Rights Movement who helped escort African-American children when they tried to integrate a Little Rock, Arkansas high school back in 1957. A founding member of Dr. King's Southern Christian Leadership Conference, he became the Executive Director of the Committee for Southern Churchmen, which is now known as Witnesses for Reconciliation.

Richard Deats is the editor of *Fellowship Magazine*, the publication of the Fellowship of Reconciliation [FOR], the largest, oldest interfaith peace organization in the United States. Since 1915 FOR has carried on programs and educational projects concerned with domestic and international peace and justice, non-violent alternatives to conflict, and the rights of conscience. FOR promotes nonviolence and has members from many religious and ethnic traditions. It is a part of the International Fellowship of Reconciliation, which has affiliates in over 40 countries. FOR was instrumental, maybe critical, in bringing the Gandhian theory of non-violent activism into play during the Civil Rights Revolution.

Thomas Cornell is the founder of the Catholic Peace Fellowship and an ordained deacon in the Catholic Church. He is the editor of *The Catholic Worker*, a newspaper of national circulation founded by Dorothy Day, and he lives at the Catholic Worker farm in Marlboro, New York.

Stephen Dear is the executive director of People of Faith Against the Death Penalty, a national organization with headquarters in Carrboro, North Carolina.

Jim and Shelley Douglass are co-founders of Mary House, Catholic Workers, in Birmingham, Alabama, peace activists, co-founders of Ground Zero Center for Nonviolent Action, and co-organizers of a national campaign to stop the "White Trains" transporting nuclear weapons across the U.S. and to stop the Trident nuclear submarine and missile system. The Douglasses believe that every non-violent movement in U.S. history could have been squelched by the way in which RICO has been applied in *NOW v. Scheidler*. They believe that the adverse rulings in this case threaten to oppress and deter the organizers of future non-violent campaigns, now unknown, that may someday prove necessary to the very existence of our country and of life on earth. The Douglasses express the hope that the Supreme Court recognizes that to bolster any one party's mental security in a controversy by destroying an opponent's right to dissent can undermine the most basic human freedoms secured by the Constitution.

William and Eugenia Durland are the founders of the Center on Law and Conscience. Their interest in this case is expressed in the form of a question: "Was Martin Luther King, Jr., a racketeer and extortionist?" They also state: "There is a danger that, in the wake of September 11, our constitutional protections will be eradicated in the name of a security state. In this context it is especially important not to allow RICO to be applied to the exercise of conscientious nonviolence."

Mary Anne Flores, *Clare Grady*, and *Jessica Stewart* are members of the Ithaca Peace Community, a group that

expresses concern about social justice issues and facilitates the representation of those who would otherwise remain voiceless and unheard in our society. These three women have engaged in non-violent direct action that has led to their arrest for trespass upon government property. For example, they have served sentences for trespass at the Hancock Airfield in Syracuse, NY, in order to protest the ongoing bombing of the people of Iraq.

Thomas Gumbleton is a Catholic bishop in the Archdiocese of Detroit, Michigan, and a founder of Pax Christi, USA. He was a leading voice urging the United States Conference of Catholic Bishops to issue its statement in 1971 collectively opposing the Vietnam War on the ground that the war could no longer be justified under the principles of the just war tradition. Bishop Gumbleton has worked and visited in poor and war-torn countries in Latin America and the Caribbean and is deeply concerned with human rights violations around the world. He holds a deep belief in the power of nonviolence to effect social change.

Nat Hentoff is a renowned civil libertarian who has served on the national board of directors of the American Civil Liberties Union. He is a nationally syndicated columnist and author.

Lana Jacobs received the Martin Luther King Award from Companions of Shalom for her work with the inner-city in Columbia, MO, where she lives in community with the poor. Ms. Jacobs has been arrested numerous times for non-violent direct actions defending the homeless and hungry. Each month she engages in some form of public protest against military build-up, which in her view robs the poor of what they rightfully deserve.

Kathy Kelly is a co-founder of Voices in the Wilderness, a campaign or movement opposing the economic sanctions imposed upon Iraq. The American Friends Service Committee nominated her last year for the Nobel Peace Prize.

Andy Lipscomb is a member of Witnesses for Reconciliation, a board member of the *Seamless Garment Network*, and a long-time activist for civil rights.

Deborah McEvoy, is a member of *Feminists for Life of America* and of the *Detroit Peace Community*. In her role as a health professional, she supports the needs of women and their children through petitions, public advocacy and demonstrations.

Rachel MacNair, a Quaker, is the founder and director of the *Feminism and Nonviolence Studies Association*. She has been arrested frequently for participation in non-violent direct actions at nuclear weapons facilities and abortion clinics.

Richard McSorley, S.J., is the founder of the *Center for Peace Studies* at Georgetown University, and a long-time activist for causes relating to peace and justice. Fr. McSorley has been a leader in these educational endeavors for over two decades. He regularly organizes students and others to appear publicly at the Pentagon, the White House, and other federal institutions in and around Washington DC, to protest policies that deprive the poor of justice.

Charles Mulholland is a Catholic priest who is a long-time activist for causes relating to peace and justice. He is a member of the *Catholic Worker House* in Garner, North Carolina.

Barry Nakell is an attorney in North Carolina actively engaged in the defense of civil liberties for decades as a member of the *American Civil Liberties Union*, and as a former professor of law at the University of North Carolina at Chapel Hill. Mr. Nakell is of the view that the use of RICO against non-violent activists is a severe infringement on the rights secured in the United States Constitution.

Lillibeth Navarro is a wheelchair-bound disabilities rights leader and activist in Los Angeles, where she works with *Communities Actively Living Independent and Free* [CALIF]. She believes that it is critical for the disabled to be in a public and visible role, which includes being able to bring their message of independence to the street, since their access to other venues is often stifled.

John W. Oliver is the coordinator of the Orthodox Peace Fellowship in North America. He is professor emeritus of history at Malone College.

Gail Phares is a founder of *Witness for Peace* [WFP] a national organization working to affect U.S. policy in Latin America. Ms. Phares is also the founder and director of the Carolina Interfaith Task Force on Central America. She has led many delegations to war-torn areas in Latin America and frequently joins non-violent peace and justice actions at home. The members of WFP believe that organizing for justice – including the right to non-violent protest of official policies of our government – is a fundamental right secured under the Constitution.

Michele Pflaum is the president of The Center for Reflection on the Second Law and a long time environmental activist working with groups such as Earth First!. She was charged with RICO violations in 1993 for actions

she took in a non-violent demonstration in Idaho protesting the actions of the National Forest Service in the largest unroaded area in the lower forty-eight states. Her interest in this case is personal, as she has experienced first hand misuse of the RICO act as a tool of intimidation to squelch her participation in America's long tradition of civil disobedience.

Michael Pfleger is Pastor of the Faith Community of St. Sabina's on Chicago's South Side, a "Pastor, Preacher, Parent, Lecturer, Activist, and 'Errand Boy for Jesus,'" who has mobilized his parish and community in a series of protest crusades, sometimes involving peaceable non-violent direct action, including campaigns against drug paraphernalia (which precipitated statewide legislation), "Standing Up – Talking Back," a social action crusade, an anti-Alcohol & Tobacco Billboard campaign which reduced the number of such billboards from 118 to 40 in the local community, and sting operations to identify vendors selling liquor to minors. On April 27, 1998, citing the verdict in *NOW vs. Scheidler*, the Chicago Sun-Times editorialized that, if RICO weren't curtailed, that statute might even be invoked to deter or punish Fr. Pfleger's and St. Sabina's community-based protest against the trivialization of violence on the Jerry Springer TV show.

Sister Helen Prejean, CSJ, is internationally known for her opposition to the death penalty and her work with both death row inmates and the families of murder victims. She is the founder of Survive, a New Orleans victim's advocacy group, and the author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*, which became both a national and international bestseller and a major motion picture. Sister

Helen does not believe that peaceful, non-violent protesters should be condemned as "extortionists" or protest leaders prosecuted as "racketeers."

Scott and Claire Schaeffer-Duffy are co-founders of the Saints Francis and Therese Catholic Worker in Worcester, MA, a lay Catholic pacifist community which offers hospitality to homeless men and women. They also publish the *Catholic Radical*, a bi-monthly journal of opinion. Scott has engaged in civil disobedience at weapons facilities and abortion clinics, and has lectured extensively at colleges and universities throughout New England on the value of non-violent direct action. The Schaeffer-Duffys state their interest in this case as follows: "Non-violent civil disobedience is an American tradition, one that has brought much good to our country. We advocate its use when laws contradict the needs of the common good and the greater law of God's love for all." The Saints Francis and Therese Catholic Worker is a member of the Seamless Garment Network.

Martin Sheen is an actor who has participated for nearly two decades in protests against weapons of mass destruction and in demonstrations pertaining to homelessness and other issues of social justice.

John Stoner is a member of Mennonite Central Committee, a traditional peace church. He is the founder of *Every Church a Peace Church*, a movement to share the convictions of the Anabaptist community with all other Christian churches.

Andrew L. Sullivan served as the Chair of the Libertarian Party of Nebraska from 1999 to 2001. His interest in this case is that law must hold the greatest punishment for violent acts and must distinguish between violent and

non-violent acts. The misapplication of RICO to non-violent civil protest levels out the distinction between violence and nonviolence creating a waterfall turn from dissent to violent action. Without non-violent action, people will passively accept government oppression no matter how severe, or be propelled directly into violent action, for the penalty for actions of nonviolence would become essentially the same as violent actions.

Brian Terrell is a leader of the Catholic Peace Ministry in Des Moines, Iowa and is a participant with members of the Des Moines Catholic Worker community in non-violent Gandhian activism at Offutt Airforce Base.

Howard Zinn is a professor of history at Boston University. He has served as a professor of history at Spelman College in Atlanta, and as a visiting professor at the University of Paris and the University of Bologna. He has written over a dozen books which deal in some way with protest movements in American history. Two of these books most closely related to the theme of this brief are *Disobedience and Democracy* (1968), and *A People's History of the United States* (3d ed. 1999).

Stephen Zunes is a Professor of Political Science at the University of San Francisco. He is the principal editor of *Non-violent Social Movements* (Blackwell, 1999). His research interests have included the impact of grassroots political movements on policy and government. Prior to his academic career, he engaged in non-violent civil disobedience campaigns against nuclear power, nuclear weapons and apartheid and served as a staff member and nonviolence trainer for organizations supporting non-violent civil disobedience.

---

23 20

Nos. 01-1118, 01-1119

Supreme Court, U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

---

CATHERINE W. SHORT
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

ANDREW W. ZEPEDA*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

**Counsel of Record*

Attorneys for Amicus

26 pgs

TABLE OF CONTENTS

Page

Table of Authorities ii

Interests of Amicus 1

I. The Seventh Circuit's Expansive Interpretation Of The Hobbs Act Is Unwarranted And Dangerous 4

II. Private Injunctive Relief Under R.I.C.O. Will Encourage Plaintiffs To Use Federal Courts To Obtain Nationwide Injunctive Relief For Conduct And In Contexts More Properly Dealt With By State Courts . 6

III. The Imposition Of A "Nationwide Injunction" Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts 12

Conclusion 19

TABLE OF AUTHORITIES

CASES:

Page

Alemite Manufacturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) 9, 10

Aradia Women's Health Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991) 13

Birmingham Women's Medical Center v. Operation Rescue, No. CV-89-P-1261-S (N.D. Ala. Aug. 2, 1989) 13

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 13, 17

Chase National Bank v. City of Norwalk, 291 U.S. 431, 436-37 (1934) 9

Dym v. White (San Diego Super. Ct. No. 670970) 13

EDP v. Vargovcik, et al., (L.A. Super. Ct. No. BC 092929) 13

Feminist Women's Health Center v. Blythe, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (1995) ... 13

Foti v. Planned Parenthood (San Mateo Super. Ct. No. 405649) 13

G.&C. Merriam Co. v. Webster Dictionary Co. Inc., 639 F.2d 29, 35 (1st Cir. 1980) 11

Herrlein v. Kanakis, 526 F.2d 252, 254 (7th Cir. 1975) 11

Hill v. Colorado, 530 U.S. 703 (2000) 4, 9

Kenneally v. Operation Rescue, et al., (L.A. Super. Ct. No. BC 075178) 13

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) 13

TABLE OF AUTHORITIES—Continued

Page

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 4, 9, 14

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989) 13

National Abortion Federation, et al. v. Operation Rescue, et al., No. CV 89-1181 (AWT) (C.D. Cal.) 13

National Abortion Federation v. Operation Rescue, 8 F.3d 680. (9th Cir. 1993) 14, 15, 16, 17, 18

National Organization for Women v. Operation Rescue, 726 F. Supp. 300 (D.D.C. 1989) 17

National Organization for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D.Va. 1989) 13

New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989) 13

Operation Rescue v. Women's Health Center, Inc. 626 So.2d 664 (Fla. 1993) 14

Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 937 S.W.2d 60 (Tex. Ct. App. 1996) 14

People v. Operation Rescue National, 80 F.3d 64, 70 (2d Cir. 1996) 11

Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991) 13

Planned Parenthood Ass'n of San Mateo County v. Operation Rescue, 50 Cal. App. 4th 290 (1996) 2, 12, 13

Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus, 14 Cal. App. 4th 162 (1993) 13

TABLE OF AUTHORITIES—Continued

Page

Planned Parenthood League of Massachusetts v. Operation Rescue, 406 Mass. 701, 550 N.E.2d 1361 (1990) 13, 14

Planned Parenthood of San Diego and Riverside Counties v. Wilson, 234 Cal. App. 3d 1662, (1991) 12

Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F. 3d 1058 (2002) 4

Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National, No. 93 CV 4266 (Colo. Dist. Ct. Aug. 10, 1993) 14

Planned Parenthood Shasta-Diablo v. Operation Rescue (Butte County Super. Ct. No. 115924) 13

Planned Parenthood Shasta-Diablo, Inc. v. Williams, 10 Cal. 4th 1009 (1995) 12

Redding Feminist Women's Health Center v. Operation Rescue (Shasta County Super. Ct. No. 112314) 13

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945) 9

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) 6

Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989) . 13

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) 9

Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) 13

State v. Baumann, 1995 Wisc. App. 17

United Pharmacal Corp. v. U.S., 306 F.2d 515, 517-18 (1st Cir. 1962) 11

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998) 10

U.S. v. Local 30, United Slate, Tile and Composition Roofers, 871 F.2d 401 (3d Cir. 1989) 8

U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 995 F.2d 375 (2d Cir. 1993) 8

Vermont Women's Health Center v. Operation Rescue, 617 A.2d 411 (Vt. 1992) 14

Volunteer Medical Clinic v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) 13

Wilkerson, et al. v. Scott, et al. (San Diego Super. Ct. No. 728883) 13, 14

Women's Health Care Services, P.A. v. Operation Rescue-National, 773 F. Supp. 258 (D. Kan. 1991) 13

Women's Health Center of Duluth v. Operation Rescue, No. CO-93-601157 (Minn. Dist. Ct. July 28, 1993) 13, 14

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112 (1969) 9

TABLE OF AUTHORITIES—Continued

Page

STATUTORY PROVISIONS:

18 U.S.C. § 248 18
18 U.S.C. § 1961 ..... 2, 3, 4, 5, 6, 7, 8
18 U.S.C. § 1962 ..... 7, 8
18 U.S.C. § 1962(a) 7
18 U.S.C. § 1962(b) 7
18 U.S.C. § 1962(c) 7
18 U.S.C. § 1962(d) 7
18 U.S.C. § 1964(a) 7
42 U.S.C. § 1985(3) 17
Hobbs Act 4
Fed. R. Civ. P. 65(d) 9

OTHER AUTHORITIES:

53 Texas L. Rev. 873, 902-03 (1975) 11
125 Harv. L. Rev. 1745 (2002) 18

Interest Of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By 1991, most of these pro-life advocates had turned to other entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at appropriate locations, including abortion facilities. Rather than applauding this conversion to lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '80's and the lawful protest of the '90's. They consider both to be unlawful interference with, and harassment of, women seeking abortions with the only difference being that the civil disobedience of the '80's occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily —and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, in the early to mid-90's, many abortion providers sought injunctions against pro-life picketers. *See infra*, Section III.

The abortion providers soon realized that the most effective way to seek injunctive relief was to invoke the name "Operation

---

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Written consent of the parties to the filing of amicus briefs have been filed with the clerk.

Rescue", a group known for civil disobedience and "rescues" in the '80's. One or two "rescues" in a defendant's past has been the key to obtaining an injunction restricting his or her lawful picketing, practically speaking, forever.[2] To this day, abortion providers and supporters gather and maintain data on who is "associated" with Operation Rescue, meaning who of today's peaceful picketers attended a blockade or Operation Rescue rally ten years ago.

Amicus LLDF fears that the nationwide RICO injunction issued in *NOW v. Scheidler* or to be issued by courts emboldened by the Seventh Circuit's affirmance in that case will be used, or abused, by abortion providers to intimidate pro-life speakers because of their past participation with Operation Rescue[3] or Pro-Life Action Network ("PLAN"), or to intimidate them from future involvement with these groups, or even groups that associate with these groups, in completely lawful First Amendment protected activities. Involvement in *lawful* protest activi-

[2] See, e.g., *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue Of California*, 50 Cal. App. 4th 290, 305 (1996), cert. denied, 522 U.S. 811 ("Cochran testified that he has contributed money to Operation Rescue, receives mailings from Operation Rescue, and has attended rallies and rescues (including those at this clinic) organized by Operation Rescue. When asked on cross-examination 'You've been involved with that organization for . . .' Cochran answered 'For a few weeks.' This is enough to justify treating Cochran as either a member of Operation Rescue, or as sufficiently associated with it that he is bound by the injunction against that entity"). Cochran's uncontradicted testimony was that he was present at the rescues at the subject clinic because he picketed at the clinic every Saturday, and so he was there when Operation Rescue appeared. His testimony that he did not participate in the blockades was corroborated by a clinic employee. Yet, his mere presence, combined with constitutionally protected associational activity such as giving money and receiving mailings, was held sufficient to deprive him of his constitutional right to demonstrate on the public sidewalk.

[3] Respondents apparently intend just such a result: "In addition to the co-conspirators listed in Exhibit B, there are hundreds or thousands of unidentified co-conspirators who have joined forces with the RICO defendants to commit racketeering activity aimed at closing clinics that perform abortions." Plaintiff's Amended RICO Case Statement, S. App. 378, 381. In Respondents' view, co-conspirators also include anyone who attended a PLAN meeting and then committed an illegal act in furtherance of the conspiracy. Tr. 2237:25-2238:22.

ties with any "Operation Rescue" entity, at abortion facilities or elsewhere, might be deemed sufficient to bring someone within the scope of the injunction. Thus, not only the "rescuer" from days gone by, but the person who, for example, lawfully distributes leaflets at a school in conjunction with Operation Rescue or PLAN today may find himself or herself subject to the jurisdiction of the United States District Court for the Northern District of Illinois or any other court which issues a nationwide injunction under RICO to private litigants. LLDF is gravely concerned that "guilt by association" will be the rule of the day in courts bound to or inclined to follow the Seventh Circuit. Leaders of pro-life organizations (or any social movement for that matter) lawfully engaged in social protest will be silenced for fear they will be held liable if any of their followers engage in independent acts which go beyond lawful protest.

I. The Seventh Circuit's Expansive Interpretation Of The Hobbs Act Is Unwarranted And Dangerous

The Seventh Circuit's decision in this case does not stand alone. It is one piece of a larger pattern of construing harm broadly in the context of abortion protests, particularly where private plaintiffs seek injunctive relief. The term "blocking" means any interference with "unfettered" access, i.e., cars having to slow down as they turn into a clinic driveway. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). "Threats" includes rhetoric not addressed to the allegedly threatened individual but to a wide audience, which contains no reference to violence or unlawful conduct. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F. 3d 1058 (2002). "Unwanted speech" means speech which has not been affirmatively consented to by a listener. *Hill v. Colorado*, 530 U.S. 703 (2000).[4] And now "extortion" requires no obtaining and no property, but means any interference with the exercise of a right, including by non-violent physical obstruction.

What sets this case apart from the others is that this particular exercise in elastic linguistics expands federal jurisdiction enormously, in both civil and criminal contexts. The Hobbs Act becomes a prosecutorial Deluxe Swiss Army Knife, useful in just about any situation. With the Hobbs Act to supply predicate acts under RICO, private litigants can take garden-variety tort allegations and, as the saying goes, make a federal case out of it.

This issue presented here is not whether the petitioners should be or in fact have been punished for any wrongful acts they committed over ten years ago. The issue is not whether parties damaged by wrongful conduct are entitled to compensation.[5] Nor is the issue whether a special exemption for petitioners and their activities should be carved out of generally applicable laws.

The specific issue presented here is whether there are limits to the relief Congress intended to be available for addressing unlawful acts, or whether Congress intended RICO to confer federal jurisdiction, including a right to nationwide injunctive relief, wherever a plaintiff alleges that a defendant committed two acts which interfered with the plaintiff's exercise of a right, as that term is most expansively interpreted.[6]

The more general and more troubling issue is whether we are to functionally abandon our commitment to the concept of criminal law as a body of reasonably clear prohibitions or restrictions on conduct, accompanied by reasonably well-defined penalties for violations. When courts can stretch the language of a law to make it encompass conduct which no reasonable person, not even a very imaginative reasonable person, would ever have dreamt of, and in so doing can increase the penalties for such conduct exponentially, then the rule of law has been gutted. It doesn't matter that the distance from Written Law A to Interpretation Z was made in numerous smaller steps, each in and of itself appearing a mere logical extension of the prior step. If the end result is absurdity, i.e., that momentarily blocking a sidewalk is "extortion,"

---

[4] This case involved a challenge to a state statute, not litigation between private parties.

[5] It should be noted that, for all Respondents' rhetoric about the Petitioners' reign of terror and violence, not a single penny was sought or awarded for any physical damage to persons or property. The only damages awarded were for increased security costs which the Respondents attributed to the Petitioners. Respondents' inability to establish any concrete damages worth suing for, much less the Petitioners' responsibility for such damages, might explain why they did not pursue ordinary tort claims but instead elected to pursue this imaginative claim under RICO.

[6] Given the extremely broad, one might say fantastic, interpretations of "obtaining" and "property" embraced by the Seventh Circuit, it is difficult to envision a court which follows this ruling finding the Hobbs Act requirement that the unlawful conduct "affects commerce" to be an insuperable barrier to jurisdiction.

that stepping on a plant is "robbery," and that doing these acts twice makes one a racketeer, then the law has become arbitrary and capricious, deserving of fear but not of respect.

II. Private Injunctive Relief Under RICO Will Encourage Plaintiffs To Use Federal Courts To Obtain Nationwide Injunctive Relief For Conduct And In Contexts More Properly Dealt With By State Courts

As discussed at length in the briefs of the petitioners, the Seventh Circuit decision permitting private civil litigants to obtain injunctive relief under RICO directly conflicts with that of the Ninth Circuit in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The Ninth Circuit conducted a thorough examination of the text and legislative history of RICO and determined that the remedy available to private plaintiffs was limited to treble damages. This decision has been followed in subsequent Ninth Circuit cases, as well as in cases in other circuits, with good reason. See Pet. at 11, n. 17.[7]

This Court and other courts have long complained about private litigants' manipulation of RICO for purposes of the intimidation the heavy hammer of treble damages and attorneys' fees can provide. This Court and many appellate courts have had to cope with the virtually unlimited creativity of lawyers in transforming commonplace business conflicts into complex civil RICO actions. One can only imagine what private litigants and their attorneys will plead if they believe they can transcend the jurisdictional bounds of state courts' equity powers and obtain a ***nationwide*** injunction and a right to recover attorneys' fees to boot.

The permanent RICO injunction issued in *NOW v. Scheidler* involves more of the same stretching of RICO far beyond Congress' intent. Not surprisingly, the injunction issued exceeds the relief

[7] All citations to the Petition (Pet.) and Petition Appendix (Pet. App.) are to the pertinent documents in No. 01-1119.

allowable under RICO. That injunction does not enjoin RICO violations. Rather it enjoins the commission of petty offenses such as trespass and vandalism, Pet. App. 279a, which any state court could do as well within the jurisdictional limits posed by state lines.

The equity jurisdiction afforded to district courts under RICO is limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operating any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of miscellaneous crimes—even the predicate offenses which may give rise to a "pattern of racketeering activity"—is not prohibited by RICO since these offenses are crimes in themselves.

Hence a district court's authority to issue injunctive relief under RICO is limited to the prevention of RICO violations, i.e., violations of section 1962. Injunctive relief is not authorized under RICO merely to prevent the commission of predicate offenses, much less petty offenses like trespass, since state courts are presumably capable of enjoining the commission of such acts. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under RICO include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any

enterprise, making due provision for the rights of innocent persons.

Except for the boilerplate prohibition on "operating an enterprise," the instant injunction does not prevent and restrain RICO violations, i.e., violations of section 1962, but instead purports to enjoin the commission of acts which Respondents contend constitute predicate offenses, namely, violations of the Hobbs Act. If the injunction were intended to prevent or restrain RICO violations it must necessarily identify the "enterprise" which is the subject of the RICO violation. The instant injunction is not a legitimate exercise of authority under RICO but instead appears to use vague RICO terminology to obtain a nationwide injunction to restrain conduct which a state court already has the power to control. Cf. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members and associates of organized crime for any commercial purpose was within scope of RICO's civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1990) (individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

The prohibition on "operating an enterprise," central to the maintenance of federal court jurisdiction, cannot be treated as a superfluity or "boilerplate." It should have been carefully and explicitly defined to ensure those charged, or who may be charged, with responsibility to comply understand what is—and is not—prohibited.

To uphold the Seventh Circuit's decision will encourage plaintiffs to contrive a civil RICO violation to obtain federal jurisdiction and obtain a nationwide injunction which enjoins nothing more than the commission of predicate offenses, or, as in this case, even petty offenses alleged to be components of predi-

cate offenses. Indeed, if this Court affirms the Seventh Circuit's unmooring of injunctive relief under RICO from its statutory purpose, other courts will undoubtedly move beyond enjoining criminal acts to ordering prophylactic injunctive restrictions on speech, such as speech-free zones,[8] cease-and-desist provisions,[9] and invitation-only requirements,[10] all of which have been defended as necessary to prevent petty criminal or tortious behavior.

It gets worse. Once such restrictions on otherwise constitutionally protected activity are in place on a nationwide, one-size-fits-all basis, the issue will become who is bound by the injunction, and which injunction they are bound by. On this issue, too, the Seventh Circuit's decision has laid the groundwork for a massive expansion of federal jurisdiction.

It is settled law that a court has no power to enjoin acts of non-parties to an *in personam* proceeding, except where such persons are knowingly and purposefully aiding and abetting a named party to violate the injunction. Fed. R. Civ. P. 65(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934) (reversing order which "assumed to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (courts may not grant an injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"; principle of applying injunctions to nonparties is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (reversing post-judgment entry of injunction against non-party who was not shown to be in concert or participation with named parties); *Alemite Manu-*

---

[8] Cf. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994).

[9] Cf. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).

[10] Cf. *Hill v. Colorado*, 530 U.S. 703 (2000).

facturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.); *U.S. v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In stark contrast, however, the Seventh Circuit interpreted the reach of the district court's injunction to encompass the independent acts of non-parties: "If individuals acting in concert with the defendants or PLAN violate the injunction, ***without inducement or direction by the defendants***, the violators, ***not the defendants***, would be in contempt of the court's order." Pet. App. 31a (emphasis added).

The Seventh Circuit thus created a previously unheard-of category of potential contemnors, i.e., persons closely enough associated with the defendants to be bound by the terms of the injunction, but not so closely associated as to be acting with the "inducement or direction" of the defendants. Such a category is a legal and logical impossibility:

> [T]he only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, ***but what it has the power to forbid, the act of a party***. This means that the respondent must either abet the defendant, or must be legally identified with him.

Alemite, 42 F.2d at 833 (emphasis added). More recently, in an abortion protest case, the Second Circuit, citing *Alemite*, held:

> In order for a court to hold a nonparty respondent in contempt of a court order, "***the respondent must either abet [the party named in the order], or must be legally identified with him.***" [citation omitted.]. . . . An injunction issued against a corporation or association binds the agents of that organization ***to the extent they are acting on behalf of the organization***. [citation omitted.] Generally, persons who cease to act in one of the designated capacities are no longer bound by the decree.

People v. Operation Rescue National, 80 F.3d 64, 70 (2d Cir. 1996) (emphasis added).

The Seventh Circuit's holding that non-parties could be held in contempt without the defendants is at odds with long-established case law on the subject of nonparty contemnors: "[A] key principle in cases binding a nonparty who is not legally identified with a party is that a person properly named in the injunction must have had a material role in the subsequent violation of that injunction." *G.&C. Merriam Co. v. Webster Dictionary Co. Inc.*, 639 F.2d 29, 35 (1st Cir. 1980). *See also United Pharmacal Corp. v. U.S.*, 306 F.2d 515, 517-18 (1st Cir. 1962) ("if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated"); *Herrlein v. Kanakis*, 526 F.2d 252, 254 (7th Cir. 1975) ("Since neither [named party] was found in violation of the order, [non-party] cannot be held liable as an aidor or abettor of the named parties in violating the injunction").

This element of third-party liability, i.e., the required joint liability of an enjoined party for any contemptuous act, acted as a brake on an overly expansive interpretation of "acting in concert." By disposing of this element, the Seventh Circuit has redefined the phrase "acting in concert" to mean mere association with an enjoined party, or, more simply put, guilt by association.[11]

---

[11] Unfortunately, courts need little encouragement to follow the Seventh Circuit's example and make this transition. As one commentator noted, "When people who oppose a majority social policy are diffuse but united by unrelenting zeal, the majority always finds it difficult to enforce that policy. It may, therefore, resort to injunctions to attempt to carry out that policy. Non-agent, independent violators, however, complicate enforcement under conventional agency or active concert doctrine. . . . The judge who constructs doctrinal mechanisms to impose sanctions on a minority that frustrates a majority policy and flouts a judicial decree will receive general approbation. . . . But it sacrifices procedural protections to social exigency and almost destroys the distinction between litigation and legislation." Rendleman, ***Beyond Contempt: Obligors to Injunctions***, 53 Texas L. Rev. 873, 902-03 (1975).

In the instant case, the injunction has been loosed from its moorings of prohibiting unlawful racketeering-related acts by the named defendants, and instead becomes a means of intimidating individuals from associating with the enjoined parties (which include organizations of alleged nationwide reach, according to the plaintiffs) in *any* activity, lest they come under the jurisdiction of the court as persons "acting in concert" with the parties.

By affirming the injunction, the Seventh Circuit failed to restrain the impermissible reach of the injunction over innumerable individuals and organizations not before the court. Private injunctive relief under RICO thus not only entails vesting district courts and private parties with sweeping powers to prohibit and prosecute conduct, both lawful and unlawful, on a nationwide basis, but to use such power against individuals who have never had their day in court.

III. The Imposition Of A "Nationwide Injunction" Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts

Respondents are not the first parties to have been awarded injunctive relief against abortion protests. Rather, their only claim to distinction is the length of time it took them to secure an injunction. During the thirteen years this action was pending in the District Court, scores of injunctions involving anti-abortion protesters have been issued by state and federal courts in other jurisdictions.

Amicus is aware of over thirty actions filed in California alone since 1985, all seeking injunctive relief against anti-abortion protests. In some of these actions, the plaintiff abortion providers were completely or partially successful.[12] In other actions, they

[12] See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88 (1995) cert. denied, 520 U.S. 1133 (1997); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal. App. 3d 1662, (1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996) cert. denied, 522 U.S. 811 (1997).

failed to obtain relief and the action was dismissed.[13] At least two injunction actions are pending at this time in California.[14]

Many of these actions, both within and outside of California, included "Operation Rescue" as a defendant.[15] In the instant case,

[13] See, e.g., *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue, et al.*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *EDP v. Vargovcik, et al.*, (L.A. Super. Ct. No. BC 092929) (filed 11/93).

[14] *Wilkerson, et al. v. Scott, et al.* (San Diego Super. Ct. No. 728883) (filed 3/99); *Foti v. Planned Parenthood* (San Mateo Super. Ct. No. 405649) (cross-complaint filed 9/98).

[15] Inside California: *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (1995) cert. denied, 516 U.S. 987 (1995); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), rev'd, 8 F.3d 680 (9th Cir. 1993); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996), cert. denied, 522 U.S. 811 (1997); *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue* (L.A. Super. Ct. No. BC 075178) (filed 3/93); *Dym v. White* (San Diego Super. Ct. No. 670970) (filed 11/93); *Redding Feminist Women's Health Center v. Operation Rescue* (Shasta County Super. Ct. No. 112314) (filed 11/94).

Outside California: *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd in part and rev'd in part*, 919 F.2d 857 (3d Cir. 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991); *Women's Health Care Services, P.A. v. Operation Rescue-National*, 773 F. Supp. 258 (D. Kan. 1991), *aff'd in part and rev'd and remanded in part*, 24 F.3d 107 (10th Cir. 1994); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), 747 F. Supp. 760 (D.D.C. 1990); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Birmingham Women's Medical Center v. Oper-*

Respondents strenuously rejected any attempt by defendants to distinguish between various entities or associations bearing the name "Operation Rescue," instead insisting that all such organizations were subsumed in the one defendant Operation Rescue. See, e.g., Tr. at 1296-98; 1299-1300; 3152-55. The Permanent Injunction issued by the court names "Operation Rescue, a/k/a Operation Rescue National" as the enjoined party. Pet. App. 270a. Assuming *arguendo* that all anti-abortion entities bearing the name "Operation Rescue" are indeed one and the same, then the same defendant sued in this action by the class of "all women's health centers in the United States which perform abortions" has over the past decade been repeatedly sued by individual women's health centers in numerous other actions.[16] These actions all arose out of the same conduct or course of conduct which was the subject of the lengthy litigation in the instant case.

The most intriguing example of the abortion provider's "two bites at the apple" approach is the case of *National Abortion Federation, et al. v. Operation Rescue, et al.*, No. CV 89-1181 (AWT) (C.D. Cal.) (filed 3/1/89) (hereinafter "*NAF v. OR*"). In that case, plaintiffs included not only the National Abortion Federation (representing its forty-eight member clinics in the state of California)

---

ation Rescue, No. CV-89-P-1261-S (N.D. Ala. Aug. 2, 1989); *Operation Rescue v. Women's Health Center, Inc.* 626 So.2d 664 (Fla. 1993 (per curiam), *aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Planned Parenthood League of Mass. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411 (Vt. 1992); *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60 (Tex. Ct. App. 1996), modified, 975 S.W.2d 546 (Tex. 1998); *Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National*, No. 93 CV 4266 (Colo. Dist. Ct. Aug. 10, 1993); *Women's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. July 28, 1993).

[16] Because the lower court in the instant action placed under permanent seal the names of the clinics which were included in and which opted out of this class action, Amicus has no way of knowing how many of the clinics in these subsequent lawsuits are also included in the Clinic Class. However, as Respondents represented to the court that only eleven clinics had opted out, it is clear that many of these clinics which sued Operation Rescue individually were also part of the Clinic Class in this action.

but thirteen other California abortion providers or affiliates of California abortion providers.

In *NAF v. OR*, plaintiffs proposed the certification of two classes: 1) all women who seek medical care from family planning and abortion service providers and are deprived of that care by defendants' actions, and 2) all family planning clinics, abortion and other gynecological care providers and women's clinics which are unable to provide care because of the defendants' action. Complaint, ¶ 22.[17] Included among the defendants was "Operation Rescue," identified as "an unincorporated association with offices in Binghamton, New York and Garden Grove, California." Id., ¶ 28. Plaintiffs subsequently named Randall Terry as Doe 1. Id. at ¶ 33.

The most specific allegations in the complaint dealt with two blockades occurring in Los Angeles on February 11, 1989, at the Westside Women's Medical Clinic and the Pico Women's Medical Clinic. Complaint, ¶¶ 41-45. These are the very same blockades about which Respondents presented extensive testimony at the trial in the instant matter. Tr. 1514-26.[18] Indeed, one of the class representative plaintiffs in *NAF v. OR*, Carolyn Thompson, is none other than the witness who testified as the Respondents' Third Anonymous Witness in the instant action.[19]

---

[17] For the convenience of the Court all the pleadings and orders in *NAF v. OR* referenced in this brief were lodged with the Court in conjunction with the Motion of Life Legal Defense Foundation to File Brief as Amicus Curiae and Brief in Support of Petitioners in support of their Petition for Certiorari in this case.

[18] See Tr. at 1515 for identification of date and location of the incident.

[19] See Complaint ¶ 45: "One woman, who was scheduled for a post-operative appointment for follow-up examination following a hospitalized abdominal surgery, had to be treated on an emergency basis at an alternative location. Although this woman, plaintiff Carolyn Thompson, informed the blockaders that she was not pregnant and did not seek an abortion, defendants still prevented her from obtaining necessary medical care." Strangely, the *NAF v. OR* complaint, filed less than three weeks after the incident, does not contain any allegations of violence similar to which the Third Anonymous Witness testified to at trial in the instant matter. Tr. 1518-21.

On March 2, 1989, plaintiffs NAF, et al., moved for and were granted a temporary restraining order prohibiting trespass, blocking, and physically abusing persons entering or leaving abortion facilities. See Temporary Restraining Order.

Plaintiffs NAF, et al., subsequently filed a motion for contempt findings against several individuals, including Defendant Joseph Scheidler and various individuals associated with Operation Rescue, based in part on a blockade which occurred at the Chico Feminist Women's Health Center on March 11, 1989. On March 13, 1989, the plaintiffs filed declarations from Dido Hasper and Penny Bertsch which stated that hundreds of copies of the federal temporary restraining order were served on participants in the blockade. See Supplemental Exhibits in Support of Request for Civil Contempt Fines.

In the instant case, Respondents called these same two witnesses, Dido Hasper and Penny Bertsch, to testify about this same blockade. These witnesses never mentioned in their testimony that a federal temporary restraining order (obtained in *NAF v. OR*) was served on all participants at the March 11 blockade. In fact, in response to a question from defense counsel about whether they had already filed a lawsuit (*NAF v. OR*) to get an injunction against that protest, Ms. Hasper testified: "No. We had filed—an attorney for us had filed a lawsuit to get an injunction against the regular protestors who were in front of the clinic. We had no idea that 500 or 400 people from Operation Rescue were going to drive up from Sacramento on that day. *So we had nothing against them.*" Tr. at 1429-30 (emphasis added).

Chico Feminist Women's Health Center was already at the time of this incident a named plaintiff in *NAF v. OR*. Complaint at ¶ 8, and it immediately sought an adjudication of contempt for violation of the court order issued in that case. Nonetheless, the district court in the instant action relied on evidence of this blockade as grounds, ten years later, for issuing further relief in the form of a nationwide injunction. Pet. App. 236a-37a.

On March 15, 1989, plaintiffs NAF, et al. were granted a preliminary injunction. A copy of this injunction, which is still in effect, is lodged with this Court. *See* footnote 17, *supra*.

Before plaintiffs in *NAF v. OR* could move for certification of the classes, however, defendants moved to dismiss the case for failure to state a claim under 42 U.S.C. § 1985(3), plaintiffs' only federal claim. The court granted the motion with leave to amend, 721 F. Supp. 1168 (C.D. Cal. 1989), and, after plaintiffs' amendment, granted a subsequent motion to dismiss without leave to amend.[20] Plaintiffs appealed the dismissal, and sought and were granted a stay of the order dissolving the preliminary injunction, pending expedited appeal.

In 1993, the Ninth Circuit reversed the order dismissing the suit and remanded the case to the district court. *National Abortion Federation v. Operation Rescue*, 8 F.3d 680. Defendants filed a petition for rehearing, which was denied in 1994. The case was then remanded to the district court, where the preliminary injunction now continues to pend, no trial having ever been conducted.

Thus, for over thirteen years, there has been and continues to be an enforceable federal court order enjoining Operation Rescue from trespass, blockades, and physical harm in the state of California. Two of the five incidents singled out for mention by the lower court in issuing the injunction in this case, Pet. App. 236a-37a, were also used as the basis for injunctive relief in *NAF v. OR*.[21] The court went on to state, "Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of the protesters," citing three examples, two of which were from these same *NAF v. OR* incidents. Pet. App. at 237a-38a.

---

[20] The motion was granted on substantially the same grounds relied on by this Court four years later in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[21] A third incident cited by the court, that of the protests in Milwaukee, Wisconsin, was also the subject of litigation which resulted in an injunction. Cf. Pet. App. 235a-36a and Tr. at 1914-16, with *State v. Baumann*, 1995 Wisc. App. LEXIS 261 at *3-*4.

The example of *NAF v. OR* highlights the inappropriate, duplicative nature of the "nationwide" injunction issued by the lower court. Not only is such broad relief unnecessary,[22] but it unfairly subjects the defendants (and those "in concert" with them) to the threat of multiple contempt actions arising from the same incidents of allegedly contemptuous conduct, mirroring the redundant lawsuits to which the defendants have already been subjected.

---

[22] One commentator, approving of the Seventh Circuit's conclusion, has criticized the Seventh Circuit only for failing to stress the inadequacy of private party injunctive relief under FACE (18 U.S.C. § 248) as a further ground for private party injunctive relief under RICO. Comment, 125 Harv. L. Rev. 1745 (2002). This commentator notes that FACE expressly provides private individuals injunctive relief against anyone who injures, intimidates or interferes with a person seeking "reproductive health services." *Id.* at 1750. But injunctive relief under RICO is necessary, according to this commentator, because it can enjoin high level "anti-abortion protest leaders" while FACE cannot reach beyond the street level activists at the entrances to "reproductive health facilit[ies]." *Id.* Thus the commentator concluded that civil RICO has a "unique value in resolving statutory gaps in the anti-abortion context." *Id.* at 1751.

However, the comment fails to provide any legislative history to explain how it could be that Congress, in adopting FACE in 1994, understood RICO adopted in 1970, three years before the Supreme Court had discovered a constitutional right to abortion, would provide a remedy for FACE's deficiencies. Consider Congress in 1994 debating the need to protect persons from being physically denied entrance to "reproductive health facilities." Congress determines that existing federal law—including presumably RICO—was inadequate to protect the right to access "reproductive health facilities." It then frames legislation—which expressly affords private parties the right to sue in federal court for damages and injunctive relief. It entitles that legislation, the Freedom of Access to Clinic Entrances Act ("FACE"). By that Act, Congress seeks to afford prosecutors and private parties a comprehensive set of remedies to ensure continued unimpeded access to "reproductive health facilities."

Consider what Congress did not do—and apparently felt it need not do—when it enacted FACE, which created a new federal felony. Congress did not add that felony to the felonies which may constitute "predicate acts" under RICO. If legislative history has any place in statutory analysis, it cannot supply any arguments for Respondents. There is no basis for contending that "RICO and FACE working together, offer reproductive health clinics and their staffs and patients comprehensive relief from anti-abortion protest violence . . . that neither statutory scheme could provide alone." *Id.* at 1746.

It behooves this Court, therefore, to carefully review whether Congress ever intended when enacting RICO to afford private litigants the right to nationwide federal injunctions when the conduct they seek to enjoin could be sought in and granted by state courts, which have the advantage of local perspective and proximity to the witnesses and parties traditionally required of equity courts.

Vesting federal courts with the power to issue nationwide injunctive relief will not only seriously alter the relationship of state and federal courts, it will result in conflicting, overlapping and duplicative injunctions and multiple contempt proceedings for single violations. This is especially pernicious where the injunctive relief impinges on protected First Amendment rights.

Conclusion

For the foregoing reasons, this Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

CATHERINE W. SHORT
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

ANDREW W. ZEPEDA*
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

**Counsel of Record*

Attorneys for Amicus

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

No. 01-1118

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. (PETA) IN SUPPORT OF PETITIONERS

JEFFREY S. KERR
General Counsel
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.
501 Front Street
Norfolk, VA 23510
(757) 622-7382

CRAIG M. BRADLEY *
James L. Calamaras
Professor of Law
INDIANA UNIVERSITY SCHOOL OF LAW
Bloomington, IN 47405
(812) 855-1257

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20pgs

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THE HOBBS ACT (AND THEREFORE RICO) WAS NOT VIOLATED BY THE PROTEST ACTIVITIES OF PETITIONERS	4
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Adderly v. Florida, 355 U.S. 39 (1966)	14
Carpenter v. United States, 484 U.S. 19 (1987)	7, 9
Evans v. United States, 504 U.S. 255 (1992)	8
Fasulo v. United States, 272 U.S. 620 (1926)	12
H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)	6
McNally v. United States, 483 U.S. 350 (1987)	7
N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886 (1982)	14
Northeast Women's Center, Inc. v. McMonagle (3rd Cir. 1989)	11
N.O.W. v. Scheidler, 267 F.3d 687, 705 (7th Cir., 2001)	7, 13
N.O.W. v. Scheidler, 510 U.S. 249 (1994)	13
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	13, 14
People v. Ryan, 232 N.Y. 234, N.E. 572, 573 (1921)	8
United States v. Anderson, 716 F.2d 446 (7th Cir. 1983)	7, 11
United States v. Arena, 180 F.3d 380 (2nd Cir. 1999	11
United States v. Capo, 817 F.2d 947 (2nd Cir. 1987) (*en banc*)	13
United States v. Enmons, 410 U.S. 396 (1973)	8
United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), cert. den. 435 U.S. 968 (1978)	10, 11
United States v. Green, 350 U.S. 415 (1956)	10
United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), cert. den. 479 U.S. 1095 (1987)	11-13
United States v. Panaro, 266 F.2d 939 (9th Cir. 2001)	12

TABLE OF AUTHORITIES—Continued

	Page
United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), cert. den. 440 U.S. 910 (1979)	10
United States v. Tropiano, 418 F.2d 1069 (2nd Cir. 1969)	10

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

	Page
Anti-Racketeering Act of 1934 (48 Stat. 979) HR No. 238, 79th Cong. 1st Sess. (Feb. 27, 1945)	7
Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. §248 (a)	4, 5
Hobbs Act, 18 U.S.C. § 1951	*passim*
Racketeer Influenced Corrupt Organizations Act 18 U.S.C. §1961	*passim*
Travel Act (18 U.S.C. §1952)	4, 6

OTHERS

	Page
91 Cong. Rec. 11900 (1945) (Statement of Cong. Hobbs)	8
1997 WL 610782 at 18-19 (N.D. Ill 1997)	5
American Law Institute, *Model Penal Code and Commentaries* (Official Draft, 1980) sec. 233.4 p. 203	8
Brian Murray, *Note: Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L.R. 691, 720 (1999)	11

TABLE OF AUTHORITIES—Continued

	Page
Craig Bradley, *NOW v. Scheidler, RICO Meets the First Amendment,* 1994 Supreme Court Review 129 (1995)	5, 11, 13, 14
Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103rd Cong., 1st Sess., P.1 (April 1 and June 10, 1993)	5
Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993)	5
James Lindgren, *Unraveling the Paradox of Blackmail*, 84 Columbia L.R. 670 (1984)	13
LaFave and Scott, *Substantive Criminal Law* (Vol. II, p. 460, 1986)	8
Tr. Trans. P.4495	6

IN THE

Supreme Court of the United States

No. 01-1118

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. (PETA) IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization that uses entirely peaceful means to expose and end animal abuse wherever it occurs. PETA enjoys the support of over 750,000 members and supporters. When PETA hears allegations of abuse, we thoroughly investigate the allegations and report our findings to the proper authorities. PETA supporters also occasionally

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

engage in non-violent civil disobedience to call public attention to laws or practices that they find objectionable consistent with the greatest protest traditions of this nation. PETA's actions closely resemble those of many social advocacy groups throughout the country's history, each of which has, in its time, incurred the wrath of those who wish no public scrutiny and no change in the status quo. In short, PETA engages in protest activity similar to that of petitioners.

Despite its purely peaceful charitable programs, PETA has been the target of false allegations of involvement or complicity in the violence or threats of violence perpetrated by other people or groups within the broad, heterogeneous animal protection movement. The danger of such false attacks is illustrated by this case in which the trial court and the Seventh Circuit labeled the petitioners as extortionists under the Hobbs Act and as racketeers under RICO without any specific finding by the jury as to which acts by petitioners constituted extortionate conduct under state or federal law. This loose application of federal anti-racketeering laws to political advocacy groups threatens PETA's aggressive advocacy for the benefit of animals and constitutes a dagger at the throat of all other movements where minor violence may accompany peaceful political action.

Thanks to its members and supporters around the world, PETA has enjoyed notable success in convincing multinational corporations, small businesses, and individuals to reduce or eliminate the suffering endured by animals at their hands. For example, PETA recently convinced McDonald's, Burger King, and Wendy's fast-food restaurants, and the Safeway grocery store chain to demand more humane animal care standards of their suppliers, resulting in reduced animal suffering for literally billions of animals each year. PETA achieves these victories by encouraging, protesting, cajoling, writing letters, leading boycotts, and conducting hard-hitting campaigns to draw media attention to the plight of the animals.

PETA's success is measured by a halt to animal abuse, improved conditions for animals, and a continuing change in public and corporate attitudes toward the rights of all animals. Like the petitioners in this case, it does not obtain any tangible or intangible property from any of its adversaries as a means of accomplishing its educational mission. Therefore, the Seventh Circuit's opinion, which eviscerates the "obtaining of property" element from the Hobbs Act, threatens PETA with the continued prospect of federal court injunctions, treble damage civil suits and even possible federal prosecution as it carries out its animal protection mission.

PETA's interest is not purely hypothetical. In 1997, PETA was sued under RICO for its investigation and exposure of animal cruelty at a New Jersey animal testing laboratory even though the United States Department of Agriculture fined the lab $50,000 for federal law violations found as a result of PETA's complaint. *Huntingdon Life Sciences, Inc. v. Rokke et al.* (E.D.VA 2:97CV597) (case settled). Other animal protection activists have been sued under RICO for peaceful protests and non-violent civil disobedience outside of a fur store. *Jacques Ferber, Inc. v. Bateman et al.* (E.D. PA 99 CIV 2277) (case settled).

PETA also has a long-standing interest in this case as an amicus. PETA was granted permission to serve this Court in that capacity in its initial consideration of this case in 1994, and PETA likewise served the Seventh Circuit, both in 1994 and 1999 following this Court's remand.

PETA expresses no view on the issue of abortion. Its interests in this case relate solely to the legal issues raised in this and petitioners' brief.

SUMMARY OF ARGUMENT

Petitioners were found liable under RICO, for operating an enterprise through a pattern of racketeering activities, specifically, extortion in violation of state law, the Hobbs Act

and the Travel Act. The Hobbs Act, 18 U.S.C. § 1951, forbids affecting commerce by robbery or extortion. It defines "extortion" as "the *obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear. . . ." (emp. added). Here it is not alleged that the petitioners sought to obtain any property from the respondents, and the judge instructed the jury that "obtaining property" need not be found. Rather, respondents claim that the property obtainment element was satisfied because the petitioners *interfered* with respondents' ability to operate abortion clinics free from interference. Neither the language, the legislative history, nor a common sense understanding of the Hobbs Act supports the deletion of the "obtainment" element as respondents urge.

ARGUMENT

THE HOBBS ACT (AND THEREFORE RICO) WAS NOT VIOLATED BY THE PROTEST ACTIVITIES OF PETITIONERS

Petitioners are members of an unpopular political advocacy movement. While their general anti-abortion position is shared by many Americans, the tactics they employ—blockading clinics, harassing patients and staff, etc.—are widely condemned. Nor are these petitioners necessarily innocent of all criminal activity. There is ample evidence in the record of this case suggesting violations of state trespassing, destruction of property, and perhaps other laws, and the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. § 248(a).[2]

---

[2] Under FACE, 18 U.S.C. § 248(a), an individual may be subject to civil and criminal penalties if he:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services.

However, as explained in my Supreme Court Review article written after the Court's first decision in this case,[3] (and before I had any contact with any of the parties to this case) violation of these statutes does not constitute a violation of RICO because neither FACE, trespassing, nor "acts or threats of violence"[4] are among the listed "predicate crimes" necessary to constitute a RICO violation.[5] Indeed, the reason that the FACE statute was demanded by pro-choice advocates was because existing federal and state laws (including, presumably, RICO and extortion) were inadequate in dealing with abortion protestors.[6] Although respondents' complaint in this case made reference to such crimes as murder, arson, and kidnapping committed by certain anti-abortion zealots, there was no proof of any such crimes having been committed by the petitioners, and these claims were dismissed by the trial judge.[7] Accordingly, the jury verdict against petitioners was based entirely on extortion–either under the Hobbs Act, the

---

[3] Craig Bradley, *NOW v. Scheidler, RICO Meets the First Amendment*, 1994 Supreme Court Review 129 (1995). (Hereinafter referred to as *Bradley, First Amendment*).

[4] The jury found four (unspecified) "acts or threats of physical violence to any person or property." *Pet's* App. 160a.

[5] See 18 U.S.C. § 1961 setting forth a long list of RICO predicate crimes.

[6] Attorney General Reno testified that "existing Federal laws, while perhaps applicable in some instances, (are) inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993). Likewise, Rep. Shumer, Chairman of the House Subcommittee considering the Bill, opined that "(t)he state laws are inadequate to deal with the problem." Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103rd Cong., 1st Sess., P.1 (April 1 and June 10, 1993).

[7] 1997 WL 610782 at 18-19 (N.D. Ill 1997).

Travel Act (18 U.S.C. §1952) or state law.[8] However, just what acts or threats the jury might have been referring to in this verdict were never specified, and the trial judge refused petitioners' request to ask the jury to be specific.[9]

Thus, in a case reminiscent of Kafka's *The Trial*, petitioners were found liable for "obstruct(ing), delay(ing) or affect-(ing) commerce" by "obtaining property from another . . . by wrongful use of actual or threatened force, violence or fear" under state and federal extortion laws, where no property was obtained, the particular acts that affected commerce were not specified by the jury, and the states whose laws were violated were not identified. Moreover, these unspecified acts were then found to constitute a "pattern of racketeering activity" in violation of RICO.[10] The vagueness of this verdict, and the difficulty of other protest groups, such as PETA, in avoiding RICO violations in light of this case, renders it a disturbing precedent.

---

[8] *See, Pet.* App. 159a-160a (Special Interrogatories and Verdict form), finding 25 violations of state extortion laws, 21 violations of federal extortion law and 23 examples of "Travel across state lines or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law." In fact, "extortion" is the only one of the Travel Act predicates on which these findings could possibly be based. *See*, 18 U.S.C. 1952 (b). (It is not specified whether any of these "extortion" crimes are related to the four "acts or threats of violence" also found by the jury).

[9] **Counsel for Defendants**: "Your honor . . . we urge that the plaintiff should list in the special interrogatories each particular incident they allege to constitute an act of force, threat or violence sufficient to be extortion." **The Court**: "Absolutely not." Tr. Trans. P.4495.

[10] *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) required that "continuity" and "relationship" of the predicate crimes must be established by the plaintiff/prosecutor in order to establish the "pattern." *Id.* at p. 242-43. If the predicate crimes have not been specified, pattern cannot be proved.

Yet the Seventh Circuit brushed off these concerns, consigning this issue to "non-serious" claims.[11] The court of appeals correctly identified the "defendant's primary contention" as being that there was no "obtaining of property" here despite the explicit requirement of the Hobbs Act.[12] However, the court then answered a different contention, stating that "this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act."[13] We agree that intangible property can satisfy the Hobbs Act, just as it can the Mail Fraud statute.[14] But just as "fraud" requires that the victim be defrauded out of "property," tangible or intangible, as this Court held in *McNally v. United States*, 483 U.S. 350 (1987), so the Hobbs Act, with its explicit "obtaining property" element, must likewise involve property obtainment.

As this Court has observed, the Hobbs Act, like its predecessor, the 1934 Anti-Racketeering Act,[15] was drawn

---

[11] This issue was considered among the "hodgepodge of other challenges to the judgment, none of which need detain us long," after the "last serious contention" was disposed. *N.O.W. v. Scheidler*, 267 F.3d 687, 705, 707 (7th Cir., 2001).

[12] *Id.* at p. 709.

[13] *Id.*, citing *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983).

[14] 18 U.S.C. §1341. As the Court's held in *Carpenter v. United States*, 484 U.S. 19, 25 (1987). "Here, the object of the scheme was to take the (victim's) confidential business information...and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes."

[15] The Anti-Racketeering Act of 1934 (48 Stat. 979) HR No. 238, 79th Cong. 1st Sess. (1934), was even more explicit in its property requirements. It made it a crime when any person (affecting commerce) "(a) obtains or attempts to obtain, by the use of (force, etc) the payment of money or other valuable considerations, or the purchase of or rental of property," (etc.), or (b) "obtains the property of another with his consent (etc.)." *Id.*

from the New York Code. *Evans v. United States*, 504 U.S. 255, 261, n. 9 (1992).[16] Both the New York Code on which the act was based, as well as its predecessor Field Code, defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear or under color of official right." *Id.*

As the New York cases cited by this Court in *United States v. Enmons*, 410 U.S. 396 (1973), make clear, an accused could not be guilty of extortion unless he "was actuated by the purpose of obtaining *financial benefit* for himself..."410 U.S. at p. 406, n. 16.[17] The Court reiterated this point in *Evans,* noting that the Hobbs Act covers "acts by private individuals pursuant to which property is obtained by means of threats, force or violence."[18] 504 U.S. at p. 261.

Forcing someone to do something against his will, by contrast, is recognized by the Model Penal Code,[19] as well as the codes of most states, as the crime of "criminal coercion," not extortion. Only a few states do not limit extortion to "obtaining property."[20] Thus it is critical, if a RICO

[16]Accord, 91 Cong. Rec. 11900 (1945) (Statement of Cong. Hobbs): "The definitions in this bill are copied from the New York Code substantially."

[17] Quoting *People v. Adelstein* (emphasis added, citation omitted). Accord, *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (intent to extort requires intent to "gain money or property.")

[18] 504 U.S. at p. 261.

[19] American Law institute, *Model Penal Code and Commentaries* (Official Draft, 1980) sec. 233.4 p. 203: "Criminal Coercion punishes threats made with 'the purpose unlawfully to restrict another's freedom of action to his detriment' while extortion is . . . limited to one who 'obtains property of another by' threats."

[20] According to LaFave and Scott, *Substantive Criminal Law* (Vol. II, p. 460, 1986) the only states that do not limit "extortion" to "obtaining property" are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming.

judgment is based on extortion under state law, to identify which state's laws were violated. This was not done here.

The trial court ignored the "obtainment" element in its instructions to the jury in this case, instead telling them that, "(i)t does not matter whether or not the extortion provided an economic benefit to PLAN."[21] In short, it is respondent's position, as spelled out in their Brief in Opposition to the Petition for a Writ of Certiorari, that by threatening demonstrations unless abortion clinics closed, and in otherwise interfering with the clinics' operations, petitioners thereby "obtained" the property of the clinics.[22]

Respondents argue that, since the property in question can be intangible, it follows that it need not be "obtained" by the defendant.[23] This misconstrues the nature of intangible property. Information, as in *Carpenter* [24] where the defendant traded on proprietary information of his employer *The Wall Street Journal*, is clearly property. But the fact that it is intangible does not mean that it cannot be stolen (in a fraud case)[25] or obtained by threat in an extortion case. Getting someone to close an abortion clinic, while it may be a deprivation of property from the victim's point of view, is not an obtainment of property by the defendant necessary to constitute extortion. Were the defendant seeking to drive the victim out of business so that the defendant could then take over that business, this would be property obtainment and

[21] Pet's App. P. 150a.

[22] Brief In Opposition to Petition for Writ of Certiorari, p. 17.

[23] *Id.*

[24] *Supra* n.12.

[25] "The words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes," and 'usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *Carpenter*, supra, 484 U.S. at p. 27 (citations omitted).

would violate the Hobbs Act, even though the defendant did not acquire the physical aspects of the victim's business. *See, e.g., United States v. Tropiano*, 418 F 2d 1069 (2d Cir. 1969), cert. den. 397 U.S. 1021. Clearly, there is no suggestion by respondents that the anti-abortion petitioners sought to assume operation of abortion clinics.

Respondents cite a raft of older cases, including *United States v. Green*, 350 U.S. 415, 420 (1956), and many court of appeals cases to support their claim. But none of the holdings support the proposition that *interference* with another's use of property interests constitutes *obtaining* that interest sufficient to violate the Hobbs Act, though there is some dictum in these cases to that effect.

In *Green*, this Court held that the Hobbs Act covered a union representative's threatening violence in order to obtain a payment for "imposed, unwanted, superfluous and fictitious services" by union members.[26] That is, it was not necessary for the defendant to attempt to "obtain property" for *himself.* It was sufficient that he sought to obtain it for the union members.[27] In fact, all of the cases (except those involving abortion clinics) cited by respondents involve defendants who sought to obtain "property", i.e. economic advantage, whether it be the right to engage in the trash business,[28] money that the defendant never showed up to receive,[29] or a business contract.[30]

---

[26] 350 U.S. at p. 417.

[27] *Id.* at p. 420.

[28] *United States v. Tropiano, supra.*

[29] *United States v. Frazier*, 560 F.2d 884 (8th Cir. 1977) *cert. den.* 435 U.S. 968 (1978).

[30] *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978) *cert. den.* 440 U.S. 910 (1979).

However, the fact that some defendants didn't succeed in obtaining the property they sought, as in *Frazier* where the defendant didn't show up to receive a ransom payment, led some courts to declare that "the gravamen of the offense is the loss to the victim."[31] Likewise, in *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. den.* 479 U.S. 1095 (1987), where the defendant's scheme was so far fetched that it had little chance of success, the court declared that "the defendant would have violated §1951 if, for example, he had simply demanded that the victim burn $1 million cash."[32] The *Lewis* court further declared that the defendant's "gain" could also simply be the humiliation of the victim.[33]

These decisions were in turn relied upon by courts, such as the Second Circuit in *United States v. Arena*, 180 F.3d 380 (2nd Cir. 1999), *cert. den.* 531 U.S. 811 (2000), and the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3rd Cir. 1989) when they concluded that interfering with abortion clinics' right to do business also constituted extortion. But this conclusion was wrong.[34]

---

[31] 560 F. 2d at p. 887.

[32] *Lewis*, 797 F.2d at p. 364.

[33] *Id.* at fn 3.

[34] Bradley, *First Amendment*, p. 139:

> "The problem is that, in the cases cited by the plaintiffs, even though the loss to the victim may have been intangible, the defendant nevertheless sought to obtain property, that is, *economic advantage*. . . . Even the cases cited by N.O.W. in which the defendant's primary motivation may have been political, such as *United States v. Anderson,* in which the defendant kidnapped an abortion clinic doctor, all included demands for economic advantage as well."

Accord, Brian Murray, *Note: Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L.R. 691, 720 (1999) reviewing the case law and concluding that Respondents' "approach ignores the fundamental nature of extortion."

While the right to do business is certainly "property," the defendant doesn't violate the Hobbs Act "when a victim is merely forced to part with property," as the Ninth Circuit recently held in *United States v. Panaro*, 266 F.2d 939, 948 (9th Cir. 2001). "Rather, there must be an 'obtaining': someone–either the extortioner or a third person–must receive the property of which the victim is deprived."[35]

But why should this be so? Isn't the damage to the victim, and the culpability of the defendant, precisely the same if the defendant seeks $1 million for himself as if he demands that the victim burn $1 million, as the Seventh Circuit hypothesized in *Lewis*? There are two answers to this proposition.

The first is that, just because the effect on the victim and the culpability of the defendant are the same does not mean that crime A is therefore the same as crime B. As a practical matter, threatening someone that you'll beat him up now if he doesn't give you money, or threatening that you'll beat him up tomorrow, have the same impact on the victim and the same culpability for the defendant. Yet the first crime is robbery, the second extortion–a distinction made by the Hobbs Act itself. Likewise, this Court held in *Fasulo v. United States*, 272 U.S. 620 (1926), that threatening someone through the mails is extortion, but not mail fraud, even though the threat might have exactly the same consequences as a fraudulent statement. Extortion, as demonstrated above, is limited to crimes in which the defendant obtains, or attempts to obtain, property. By respondents' reasoning, threatening to punch an anti-abortion demonstrator unless he stops demonstrating would now be robbery, and threatening to call the police would now be extortion,[36] since the clinic operator

[35] *Id.*

[36] It is not clear that such a threat would violate the Hobbs Act, which is limited to obtaining property "induced by wrongful use of force, violence or fear. . . ." 18 U.S.C. § 1951(b)(2). But, if the "obtaining property" element is eliminated, it would violate the Model Penal code and the codes of many states. Section 223.4 of the Model Penal Code defines "theft by extortion" as "obtaining property by threatening to . . . (2) accuse anyone of a criminal offense. . . ."

would be "interfering with the right of the victim," as the court below put it,[37] to demonstrate.

The second problem with the *Lewis* hypothetical lies in the First Amendment. As Justice Souter recognized in his concurring opinion in *NOW I*, 510 U.S. 249, 264, "[c]onduct alleged to be Hobbs Act extortion may turn out to be fully protected First Amendment activity. . . ." If the "obtaining property" element is removed from the Hobbs Act, then threatening to demonstrate peacefully outside an abortion clinic, and thereby interfere with business, becomes a Hobbs Act violation.[38] This is the paradox of extortion: threatening to do that which is legal becomes illegal.[39] But when the action threatened is protected by the First Amendment, it is clearly unconstitutional to criminalize the threat unless property is sought by the defendant.[40]

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a civil rights group demanded that the respondent cease his "blockbusting" real estate sales practices or they would distribute pamphlets critical of him. The Court struck down an injunction on the pamphleteering as a prior restraint, and, in the process, also made it clear that the original threat to the respondent was protected: "The claim that the expres-

[37] 267 F.3d at p. 709. (citation omitted).

[38] It is well settled that the "fear" element is satisfied by fear of economic loss. *See, e.g. United States v. Capo*, 817 F.2d 947 (2nd Cir. 1987) (*en banc*).

[39] James Lindgren, *Unraveling the Paradox of Blackmail*, 84 Columbia L.R. 670 (1984).

[40] Bradley, *First Amendment*, p. 161.

sions were intended to have a coercive impact on respondent does not remove them from the reach of the First Amendment."[41]

As I interpreted this case in 1994:

> This is not extortion, but not because the threat is to perform some legitimate activity since, as noted above, threats to perform legitimate acts may nevertheless be the basis of an extortion charge. Nor is it that the act threatened is constitutionally protected. If X threatens a merchant that CORE will picket, legally, outside his store and drive away business unless he contributes $500 to CORE, this is probably extortion as well. Rather, the reason must be, as in *Keefe*, that the threat is to perform a legal act, *and* the goal is to achieve a political end, rather than to obtain property from a particular victim.[42]

---

[41] *Keefe*, supra, at p. 419.

[42] Bradley, *First Amendment,* supra at p. 162. This is not to say that violence or threats of violence are protected by the First Amendment. They are not. E.g. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 916 (1982). Nor is the commission of nonviolent crimes protected. See, *Adderly v. Florida*, 385 U.S. 39 (1966). But the threat to commit nonviolent crimes in the name of political protest is protected just as much as the threat to commit legal protest because the civil disobedience, and the ensuing arrest, may be an essential part of the protest activity. See, Bradley, *First Amendment* at pp. 163-165, expanding on this theme.

CONCLUSION

In conclusion, the "obtainment" element is an integral part of the Hobbs Act. It distinguishes extortion from the crime of "criminal coercion." To read it out of the Hobbs Act, as the court below did in this case, is to subject all political protests, or the threat thereof, which have a tendency to interfere with business, to prosecution. But this result would clearly violate the First Amendment.

Respectfully submitted,

JEFFREY S. KERR
General Counsel
PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.
501 Front Street
Norfolk, VA 23510
(757) 622-7382

CRAIG M. BRADLEY *
James L. Calamaras
Professor of Law
INDIANA UNIVERSITY SCHOOL
OF LAW
Bloomington, IN 47405
(812) 855-1257

* Counsel of Record

Supreme Court, U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(25) (21)

Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ALABAMA, NEBRASKA, NORTH DAKOTA, AND SOUTH DAKOTA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

WILLIAM H. PRYOR JR.
Attorney General of Alabama

CHARLES B. CAMPBELL*
Deputy Solicitor General
Counsel of Record *

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for *Amicus Curiae*, the State of Alabama

(Additional Counsel Listed Inside Front Cover)

Lepis Neg

39 pp

Additional Counsel for *Amici Curiae*

DON STENBERG
ATTORNEY GENERAL OF
NEBRASKA
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

WAYNE STENEHJEM
ATTORNEY GENERAL OF
NORTH DAKOTA
600 East Boulevard Avenue
Bismark, ND 58505
(701) 328-2210

MARK BARNETT
ATTORNEY GENERAL OF
SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

ROBERT TORRES
ATTORNEY GENERAL OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS
Office of the Attorney General
State House Building, Station 6
Saipan, MP 96950
(670) 664-2338

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion"—and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added))—criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Brief for *Amici Curiae* in Support of Petitioners 1

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument 4

I. The Creation of an Implied Private Equitable Action Under Civil RICO Violates this Court's "Particular Understanding of the Genesis of Private Causes of Action." 4

II. The Expansion of the Hobbs Act to Prohibit Conduct That Does Not Involve "the Obtaining of Property" Raises the Specter of Unnecessary Civil RICO Litigation Against State and Local Officials. 7

III. The Expansion of the Hobbs Act to Apply to Intangible, Non-economic Rights Departs from the Common Law of Extortion. 13

Conclusion 19

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. *Sandoval*,
532 U.S. 275 (2001) 2–7

Alford v. *City of Newport News*,
220 Va. 584, 260 S.E.2d 241 (1979) 11

Amico's Inc. v. *Mattos*,
789 A.2d 899 (R.I. 2002) 11

Bray v. *Alexandria Women's Health Clinic*,
506 U.S. 263 (1993) 18

Brown v. *NationsBank Corp.*,
188 F.3d 579 (5th Cir. 1999),
cert. denied, 530 U.S. 1274 (2000) 12

Carpenter v. *United States*,
484 U.S. 19 (1987) 9, 17

Carter v. *United States*,
530 U.S. 255 (2000) 13

City of Tucson v. *Grezaffi*,
200 Ariz. 130, 23 P.3d 675 (Ct. App. 2001) 11

Cleveland v. *United States*,
531 U.S. 12 (2000) 17

Commonwealth v. *Coney*,
2 Mass. 523 (1807) 15

Commonwealth v. *Mitchell*,
66 Ky. (3 Bush) 25, 96 Am Dec. 192 (1867) 15

Commonwealth v. *Pease*,
16 Mass. 91 (1819) 15

TABLE OF AUTHORITIES—*Continued*

Page(s)

Dutchess/Putnam Rest. & Tavern Ass'n, Inc. v. *Putnam County Dep't of Health*, 178 F. Supp. 2d 396 (S.D.N.Y. 2001) 11

Empire State Rest. & Tavern Ass'n, Inc. v. *Rapoport*, 240 A.D.2d 576, 658 N.Y.S.2d 687 (1997) 11

Evans v. *United States*, 504 U.S. 255 (1992) ..... *passim*

Gregoire v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 13

Guerrero v. *Gates*, 110 F. Supp. 2d 1287 (C.D. Cal. 2000) 10

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 12, 13

Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889 (2002) 7

Justiana v. *Niagara County Dep't of Health*, 45 F. Supp. 2d 236 (W.D.N.Y. 1999) 11

LDM, Inc. v. *Princeton Reg. Health Comm'n*, 336 N.J. Super. 277, 764 A.2d 507 (Law Div. 2000) ... 11

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 5

La Tour v. *Stone*, 139 Fla. 681, 190 So. 704 (193) 15

Leonard v. *Duchess County Dep't of Health*, 105 F. Supp. 2d 258 (S.D.N.Y. 2000) 11

TABLE OF AUTHORITIES—*Continued*

Page(s)

Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) 8

McNally v. *United States*, 483 U.S. 350 (1987) 17

Mich. Rest. Ass'n v. *City of Marquette*, 245 Mich. App. 63, 626 N.W.2d 418 (2001) 11

Nassau Bowling Propreitors Ass'n v. *County of Nassau*, 965 F. Supp. 376 (E.D.N.Y. 1997) 11

Ore. Rest. Ass'n v. *City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000) 11

People v. *Adelstein*, 9 A.D.2d 907, 195 N.Y.S.2d 27 (1959) 16

People v. *Squillante*, 8 N.Y.2d 998, 169 N.E.2d 425 (1960) 16

Tri-Nel Management, Inc. v. *Bd. of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001) 11

Rex v. *Burdett*, 91 Eng. Rep. 996 (K.B. 1696) 14–15

United States v. *Anderson*, 716 F.2d 446 (7th Cir. 1983) 8

United States v. *Debs*, 949 F.2d 199 (6th Cir. 1991) 8

United States v. *Enmons*, 410 U.S. 396 (1973) 16

United States v. *Hoelker*, 765 F.2d 1422 (9th Cir. 1985) 8

TABLE OF AUTHORITIES—*Continued*

Page(s)

United States v. *Nadaline*,
471 F.2d 340 (5th Cir. 1973) 8

United States v. *Panaro*,
266 F.3d 939 (9th Cir. 2001) 9

United States v. *Provenzano*,
334 F.2d 678 (3d Cir. 1964) 9

United States v. *Santoni*,
585 F.2d 667 (4th Cir. 1978) 8

United States v. *Stillo*,
57 F.3d 553 (7th Cir. 1995) 8

United States v. *Stephens*,
964 F.2d 424 (5th Cir. 1992) 8

United States v. *Tropiano*,
418 F.2d 1069 (2d Cir. 1969),
cert. denied, 397 U.S. 1021 (1970) 16

Statutes:

Freedom of Access to Clinic Entrances Act of 1994,
Pub. L. 103-259, 108 Stat. 694 (codified as
amended at 18 U.S.C. § 248 (2000)) 18

18 U.S.C. § 1341 (2000) 9

18 U.S.C. § 1343 (2000) 9

Hobbs Act, 18 U.S.C. § 1951 (2000) ..... *passim*

Racketeer Influence and Corrupt Organizations Act
18 U.S.C. § 1961(1)(B) (2000) 8

18 U.S.C. § 1962 (2000) 5–6

TABLE OF AUTHORITIES—*Continued*

Page(s)

18 U.S.C. § 1964 (2000) ..... *passim*

42 U.S.C. § 1985(3) 18

Penal Law of 1909, § 850, as amended, 1917 N.W.
Laws, ch. 518 (codified at N.Y. Penal Law § 850
(McKinney Supp. 1965) 16

Other Authorities:

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129 16

Craig M. Bradley, *NOW v. Scheidler Round Two*,
27 Syracuse J. Int'l L. & Com. 233 (2000) 16

3 Edward Coke, *A Systematic Arrangement of Lord Coke's First Institute* (J.H. Thomas ed. 1826) 14

Comm'rs of the Code, *Proposed Penal Code of the State of New York* § 613 (1865) 16

Randy J. Curato et al., *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 Notre Dame L. Rev. 1027 (1983) 16

The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Senate Comm. on Labor and Human Resources, 103d Cong. (1993) 18

1 William Hawkins, *Pleas of the Crown* (6th ed. 1787) ... 14

Donald P. Judges, *Hard Choices, Lost Voices* (1993) 1

James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988) 14

TABLE OF AUTHORITIES—*Continued*

Page(s)

Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) 10

Sup. Ct. R. 37.4 1

U.S. Dep't of Justice, *Criminal Resource Manual* 2404 (Oct. 1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02404.htm 17

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The States of Alabama, Nebraska, North Dakota, and South Dakota, and the Commonwealth of the Northern Mariana Islands (hereinafter "the *amici* States") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4 in support of the Petitioners.

INTEREST OF *AMICI CURIAE*

Abortion has rightly been called "one of the most divisive issues of our time."[1] The *amici* States recognize that many of their citizens have deep convictions regarding abortion. Because they are responsible for upholding the rule of law and safeguarding social order, the *amici* States categorically condemn criminal acts of violence by or against those who consider themselves pro-life or pro-choice. As with any divisive issue, the debate over abortion calls for peaceful, reasoned discussion. The *amici* States seek to promote such peaceful engagement, and oppose efforts to silence either side.

The issues upon which the Court has granted certiorari have broad implications far beyond the context of the present case, which involves abortion protest activities. State governments have a profound interest in protecting both the physical safety and the fundamental rights of their citizens. The *amici* States thus have an interest in seeing that all citizens are protected while respecting any citizen's constitutionally protected interest in legitimate, peaceful protest, no matter what the underlying issue. More pragmatically, State officials are named as defendants in countless lawsuits alleging State interference with various individual rights. The *amici* States thus

---

[1] Donald P. Judges, *Hard Choices, Lost Voices* 4 (1993).

have an interest in seeing that their officials do not face an unwarranted threat of civil RICO litigation arising from an overly expansive interpretation of the scope and purpose of that statute and the Hobbs Act. The Seventh Circuit's interpretation of the Hobbs Act and civil RICO threatens these interests and injects unnecessary ambiguity into the law of extortion.

SUMMARY OF ARGUMENT

In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court explained its "particular understanding of the genesis of private causes of action." *Id.* at 286. The decision below, which found an implied private cause of action for injunctive relief in the civil RICO statute, 18 U.S.C. § 1964(c) (2000), is inconsistent with this Court's holding in *Sandoval*. The text of the civil RICO statute manifests a congressional intent to authorize the Attorney General of the United States to seek injunctive relief under RICO, but to authorize private persons to seek only treble damages, costs, and attorney's fees. Nowhere does the statute authorize private entities to seek injunctive relief under RICO, and Congress has repeatedly refused to amend civil RICO to create such a private cause of action for injunctive relief. Moreover, the creation of a private cause of action for injunctive relief under civil RICO chills legitimate activity protected by the First Amendment.

The expansion of the definition of "extortion" under the Hobbs Act, 18 U.S.C. § 1951(b)(2) (2000), by the Seventh Circuit to prohibit conduct that does not involve "the obtaining of property" raises the specter of unwarranted civil RICO litigation against State officials. By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. This interpretation could subject almost any State

regulation of economic activity or property to civil RICO litigation. It also expands civil RICO to chill activity protected by the First Amendment in which protesters or demonstrators do not obtain property of any kind. Such untoward results are avoided by simply applying the Hobbs Act as written, to require an "obtaining of property."

The Seventh Circuit's expansion of the Hobbs Act (and, in turn, civil RICO) to apply to intangible, non-economic rights represents a substantial departure from the common law of extortion. At common law, extortion required the taking of "money," or "a thing of value" or a "valuable thing." Even under the "broad sense" of property used in modern Hobbs Act cases, "property" should be interpreted to mean, at most, a right with financial or economic value. The Court of Appeals' inclusion of intangible, non-economic rights in the meaning of "property" for purposes of the Hobbs Act leaves the "outer boundaries" of extortion under color of official right "ambiguous" and could have unintended consequences. The Hobbs Act simply does not apply to intangible, non-economic rights such as the "right[ ] to seek medical services." If it did, the Freedom of Access to Clinic Entrances Act of 1994 would have been unnecessary.

ARGUMENT

I. THE CREATION OF AN IMPLIED PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF UNDER CIVIL RICO VIOLATES THIS COURT'S "PARTICULAR UNDERSTANDING OF THE GENESIS OF PRIVATE CAUSES OF ACTION."

In this case, the Seventh Circuit found an implied private right of action to obtain injunctive relief under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. § 1964(c) (2000). Pet. App. at 6a–14a.[2] That holding violates the basic understanding of implied causes of action expressed by this Court in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In *Alexander* v. *Sandoval*, this Court observed:

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

[2] All citations to "Pet. App." herein are to the Appendix to the Petition for Writ of Certiorari in No. 01-1118.

Id. at 286–87 (citations omitted) (emphasis added) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment)). Although the Court of Appeals cited *Sandoval*, Pet. App. at 6a, its analysis is inconsistent with the "particular understanding of the genesis of private causes of action" expressed in that decision.

The civil remedies provision of RICO provides, in pertinent part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) *The Attorney General may institute proceedings under this section.* Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) *Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the*

> *damages he sustains* and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964 (emphasis added).

The statute specifically provides that only the Attorney General "may institute proceedings under" § 1964 generally. 18 U.S.C. § 1964(b). Unlike the Attorney General, private persons are not authorized to "institute proceedings under" § 1964 generally. Instead, private persons have the far more limited ability to sue for business or property injuries sustained "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Recovery by private plaintiffs is limited to treble damages, costs, and attorney's fees, *id.*; nowhere does § 1964(c) authorize private persons to sue for injunctive relief under § 1964(a). As this Court noted in *Sandoval*, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. This is especially the case when the other method of enforcement (i.e., by the Attorney General) is specified in the immediately preceding subsection.

Given the plain text of the statute and the marked difference between the broad authority granted the Attorney General to sue under § 1964 and the limited authority granted private parties to sue only for damages, the Seventh Circuit's "parity of reasoning" approach, Pet. App. at 8a, is inappropriate. That approach renders the differences between the statutory language in § 1964(b) and § 1964(c) meaningless. It effectively amends § 1964(c) to state that a person injured by a violation of § 1962 "shall recover [, *in addition to any relief authorized in subsection (a) to which he is entitled*,] threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee."

Congress had (and has) the ability to write the RICO statute that way, of course, but has repeatedly chosen not

to do so. *See* Pet. in No. 01-1119 at 16–19 & n.22 (recounting history of attempts to amend RICO to authorize private injunctive actions). The federal courts should not, therefore, create that result "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287. As this Court recently stated in a patent case, the task of statutory interpretation "is not to determine what would further Congress's goal . . ., but to determine what the words of the statute must fairly be understood to mean." *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1895 (2002).

In the context of this case, moreover, the addition of private injunctive remedies to the already powerful treble damages available to private persons is neither desirable "as a policy matter" nor in furtherance of "Congress's goal." The application of civil RICO to political or social protest activities has a substantial chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further. Congress never intended such a result.

II. THE EXPANSION OF THE HOBBS ACT TO PROHIBIT CONDUCT THAT DOES NOT INVOLVE "THE OBTAINING OF PROPERTY" RAISES THE SPECTER OF UNNECESSARY CIVIL RICO LITIGATION AGAINST STATE OFFICIALS.

A second troubling feature of the Seventh Circuit's decision is its interpretation of the "obtaining of property" element in the definition of extortion under the Hobbs Act, 18 U.S.C. § 1951 (2000). The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or

threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). An act indictable under the Hobbs Act, in turn, is a predicate act under RICO. 18 U.S.C. § 1961(1)(B) (2000).

The Court of Appeals noted that it "has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and chose not to revisit that holding. Pet. App. at 29a (citation omitted) (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)). The court then rejected petitioners' argument "that, even if 'property' was involved, the defendants did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Id.* The Court of Appeals observed that according to its precedent, " 'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.' " *Id.* (quoting *United States* v. *Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

The difficulty with the Seventh Circuit's interpretation is not one of applying the Hobbs Act to intangible property. Pet. App. at 29a (citing *Anderson*, 716 F.2d at 450). The Courts of Appeals have applied the Hobbs Act to intangible property. *See, e.g.*, *Libertad* v. *Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (binding precedent in both Fifth and Eleventh Circuits). This Court has similarly held that the mail and

wire fraud statutes[3] apply to intangible property. *Carpenter* v. *United States*, 484 U.S. 19, 25–27 (1987).

The principal flaw in the Seventh Circuit's interpretation is that, under the Hobbs Act definition of extortion, someone must *obtain* (or attempt or conspire to obtain)[4] the victim's property—whether tangible or intangible. As Petitioner points out, the Ninth Circuit has held that this "obtaining" element is critical to finding a violation of the Hobbs Act:

> The four conspirators sought not only to put Blitzstein [the victim] out of business, but actually to get his business interests for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof." But under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone—either the extortioner or a third person—must receive the property of which the victim is deprived.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (citations omitted) (quoting *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.1964)).

By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act—

---

[3] 18 U.S.C. §§ 1341, 1343 (2000).

[4] *See* 18 U.S.C. § 1951(a) ("or attempts or conspires so to do"). As used herein, references to "obtaining" include attempting to obtain or conspiring to obtain.

and thus civil RICO. As Petitioners assert, this interpretation "creates considerable mischief for government actors." Pet. in No. 01-1119, at 20. Perhaps not every act of official misconduct would implicate the kind of intangible economic interests protected by the Hobbs Act, and thus civil RICO. Many official actions certainly would implicate economic interests, however. If "obtaining" tangible or intangible property were not required in order to violate the Hobbs Act, a host of State actions that affect economic interests could conceivably become the subject of civil RICO litigation.

For example, under the Seventh Circuit's interpretation of the "obtaining of property" element of the Hobbs Act, a plaintiff alleging that excessive police force resulted in a loss of wages could allege a Hobbs Act violation, and thus a RICO predicate act. Any police or sheriff's department facing two or more excessive force claims could face a RICO lawsuit, provided the victims alleged that there was some "pattern" to the use of excessive force. *See, e.g.*, *Guerrero* v. *Gates*, 110 F. Supp. 2d 1287, 1292–93 (C.D. Cal. 2000) (denying motion to dismiss civil RICO action against police officers based on plaintiff's pecuniary losses said to result from alleged police misconduct); *see generally* Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) (advocating use of civil RICO against police for repeated civil rights violations, based on victims' pecuniary losses).

Removing the "obtaining" element would substantially broaden the Hobbs Act definition of extortion so that it could even apply to State economic, health, or environmental regulation. This would open the way for civil RICO litigation over any number of governmental decisions that inevitably have economic impact. If those decisions turned out to have been based upon a misunderstanding of the law, and businesses suffered

pecuniary losses as a result of the later-invalidated regulation or statute, those businesses' traditional claims for damages could also become Hobbs Act claims and used as RICO predicate acts.

For example, consider the potential impact of civil RICO on a local ordinance prohibiting smoking in indoor public places. After enacting the ordinance, local officials threaten the owners of all bars and nightclubs in town with prosecution if they do not comply with the ordinance. After months of sharply reduced business as a result of the indoor smoking ban, the owners of several clubs sue the city for injunctive relief—and include a claim for damages resulting from reduced business due to the ban. The trial court concludes that the ordinance is invalid under State law.[5] Under the Seventh Circuit's expansive interpretation of the "obtaining of property" for purposes of the Hobbs Act, it might be alleged that the city wrongfully "obtained" the clubs' property interest in doing business in the city free from unlawful (and thus "wrongful")

---

[5] *See, e.g., Dutchess/Putnam Rest. & Tavern Ass'n, Inc.* v. *Putnam County Dep't of Health*, 178 F. Supp. 2d 396 (S.D.N.Y. 2001) (holding provision in county sanitary code purporting to regulate smoking in public places invalid under State constitution); *Leonard* v. *Duchess County Dep't of Health*, 105 F. Supp. 2d 258 (S.D.N.Y. 2000) (same); *Justiana* v. *Niagara County Dep't of Health*, 45 F. Supp. 2d 236 (W.D.N.Y. 1999) (same); *Mich. Restaurant Ass'n* v. *City of Marquette*, 245 Mich. App. 63, 626 N.W.2d 418 (2001); *LDM, Inc.* v. *Princeton Reg. Health Comm'n*, 336 N.J. Super. 277, 764 A.2d 507 (Law Div. 2000) (holding local ban on smoking in most indoor places invalid because preempted by state law); *Nassau Bowling Propreitors* Ass'n v. *County of Nassau*, 965 F. Supp. 376 (E.D.N.Y. 1997); *Alford* v. *City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979) (holding local ordinance invalid and reversing conviction under it). *But see Amico's Inc.* v. *Mattos*, 789 A.2d 899 (R.I. 2002) (upholding ordinance); *City of Tucson* v. *Grezaffi*, 200 Ariz. 130, 23 P.3d 675 (Ct. App. 2001); *Tri-Nel Management, Inc.* v. *Bd. of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001); *Ore. Rest. Ass'n* v. *City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000); *Empire State Rest. & Tavern Ass'n, Inc.* v. *Rapoport*, 240 A.D.2d 576, 658 N.Y.S.2d 687 (1997).

restrictions on smoking. Because there are at least two such clubs, the same threats of prosecution were made to the owners of each, and the owners all "feared" prosecution, the city and its officials could find themselves facing a civil RICO action for treble damages.

Such examples are not limited to the context of regulating smoking. One can imagine similar scenarios in disputes over handguns, zoning actions, permitting and licensing activities, regulation of sexually oriented businesses, patent infringement, environmental regulations, and so on. Of course, qualified immunity and the *mens rea* element for Hobbs Act violations would shield government officials from civil RICO liability in many such situations. *See, e.g.*, *Brown* v. *NationsBank Corp.*, 188 F.3d 579, 587–88 (5th Cir. 1999) (applying qualified immunity to civil RICO claim), *cert. denied*, 530 U.S. 1274 (2000); *see also Evans*, 504 U.S. at 277 (KENNEDY, J., concurring) (discussing *mens rea* requirement in Hobbs Act cases). RICO's treble damages would nonetheless triple the compensatory damages plaintiffs would otherwise recover in cases where those defenses were unsuccessful, however. The automatic trebling of compensatory damages could frustrate decades spent by this Court carefully balancing the vindication of civil and constitutional rights against the risk of unduly inhibiting governmental officials in the *lawful* exercise of their discretionary functions. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982).[6] The

[6] "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (footnote omitted) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

imposition of compensatory damages, and, in appropriate cases, punitive damages, is better calibrated toward maintaining the balance this Court has struck.

III. THE EXPANSION OF "PROPERTY" UNDER THE HOBBS ACT TO INCLUDE INTANGIBLE, NON-ECONOMIC RIGHTS DEPARTS FROM THE COMMON LAW OF EXTORTION.

The Seventh Circuit's expansion of "property" under the Hobbs Act to apply to mere interference with intangible, non-economic rights of the victim, *see* Pet. App. at 29a (identifying "the class women's rights to seek medical services from the clinics"), is also troubling. This interpretation of "property" represents a marked departure from the common-law definition of extortion.

In *Evans* v. *United States*, 504 U.S. 255, 261–64 (1992), this Court "observed that 'extortion' in 18 U.S.C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law." *Carter* v. *United States*, 530 U.S. 255, 266 (2000). "At common law, extortion was an offense committed by a public official who took 'by colour of his office' *money* that was not due to him for the performance of his official duties." *Evans*, 504 U.S. at 260 (footnote omitted) (emphasis added). Supporting this definition of common-law extortion, the Court noted that "Blackstone described extortion as 'an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any *money or thing of value*, that is not due to him, or more than is due, or before it is due." *Id.* at 260 n.4. (quoting 4 William Blackstone, *Commentaries* *141) (emphasis deleted and added). The Court also noted that

> Hawkins' definition of extortion is probably the source for the official right language used in the Hobbs Act. Hawkins defined extortion as follows: "[I]t is said, That extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of *money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due."

Id. (quoting 1 William Hawkins, *Pleas of the Crown* 316 (6th ed. 1787)) (emphasis added) (citation omitted) (citing James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 864 (1988)). Hawkins's definition was partly based on Lord Coke's, which read: "Extortion, in its proper sense, is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any *money or valuable thing* . . . either that is not due, or more than is due, or before it be due . . . ." Lindgren, 35 UCLA L. Rev. at 864 n.287 (quoting 3 Edward Coke, *A Systematic Arrangement of Lord Coke's First Institute* 587 (J.H. Thomas ed. 1826)) (emphasis added).

As shown by the italicized language from *Evans* and these common-law treatises, common-law extortion involved the taking of "money" or a "thing of value" or a "valuable thing." For example, in *Rex* v. *Burdett*, 91 Eng. Rep. 996 (K.B. 1696), a farmer was tried for extortion because "he had taken divers sums of money of the market people for rent for the use of the little stalls in the market, and divers great sums for fines." *Id.* at 996. The court noted "that if the defendant erects several stalls, and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, *the taking of money* for the use of the stalls in such case is extortion." *Id.* (emphasis added). The court went on to

observe that "the extorsive agreement, or the usurious agreement, is not the offence, *but the taking* . . . ." *Id.* at 997 (emphasis added). Thus, the farmer's interference with the other market people's sales, standing alone, was insufficient to make out a case of common-law extortion; it was the use of that interference *to obtain money* from them that constituted extortion.

American cases were also quite strict in their interpretation of "money" or "thing of value." In an early Massachusetts case, the court held that a deputy sheriff's receipt of a negotiable note for higher fees than allowed by statute was not extortion. *Commonwealth* v. *Cony*, 2 Mass. 523 (1807). The court observed that "[t]o constitute extortion at common law, there must be the receipt of money, or of some other thing of value." *Id.* at 524. The court concluded that the deputy's receipt of a negotiable note did not constitute extortion because "the receipt of a negotiable note . . . is not the payment of money" and the note, being "*ipso facto* void, . . . was consequently of no value." *Id.* In a later case, the court explained its rationale: "The fees may never be received, . . . and the essence of the offence, which is the receiving, would never have occurred." *Commonwealth* v. *Pease*, 16 Mass. 91, 93 (1819); *see also La Tour* v. *Stone*, 139 Fla. 681, 695, 190 So. 704, 710 (1939) ("A mere agreement to pay will not be sufficient . . . .") (quoting annotation following *Commonwealth* v. *Mitchell*, 66 Ky. (3 Bush) 25, 96 Am. Dec. 192, 195 (1867), which cited *Cony*, *Pease*, and *Burdett*).

In modern Hobbs Act cases, lower courts have held that the concept of "property" that must be obtained in order to violate the Act is not limited to money or tangible property, "but includes, in a broad sense, any valuable right considered as a source or element of wealth." *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). This "broad sense" of property in the modern cases also expresses its limitation,

however: A "property" interest must have economic or financial value. *Cf.* Randy J. Curato et al., *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 Notre Dame L. Rev. 1027, 1061 (1983) ("It appears, then, that the interest must at least have economic value, and the cases support this notion.").

In *Evans*, this Court noted that the models for the Hobbs Act were "the New York [extortion] statute,"[7] and "the Field Code, a 19th-century model code."[8] 504 U.S. at 263 n.9. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court observed that, under New York's extortion statute, "[a]n accused . . . could not be convicted without sufficient evidence that he 'was actuated by the purpose of obtaining *a financial benefit* for himself . . . .'" *Id.* at 406 n.16 (emphasis added) (quoting *People* v. *Adelstein*, 9 A.D.2d 907, 908, 195 N.Y.S.2d 27, 28 (1959), *aff'd sub nom. People v. Squillante*, 8 N.Y.2d 998, 169 N.E.2d 425 (1960)); *see also* Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 140 (quoting *Enmons* and concluding that the conduct pleaded in *Scheidler* is "criminal coercion," not extortion); Craig M. Bradley, *NOW v. Scheidler Round Two*, 27 Syracuse J. Int'l L. & Com. 233, 239 (2000) (same).

Thus, the classic case of common-law extortion was what this Court described in *Evans*—"a public official who took 'by colour of his office' *money* that was not due to him for the performance of his official duties." 504 U.S. at 260 (footnote omitted) (emphasis added). Similarly, "[t]he usual fact situation for a Hobbs Act charge under color of official right is a public official trading his/her official actions in [an] area in which he/she has actual authority

---

[7] Penal Law of 1909, § 850, as amended, 1917 N.Y. Laws, ch. 518 (codified at N.Y. Penal Law § 850 (McKinney Supp. 1965)).

[8] Comm'rs of the Code, *Proposed Penal Code of the State of New York* § 613 (1865).

in exchange for the *payment of money*." U.S. Dep't of Justice, *Criminal Resource Manual* 2404 (Oct. 1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02404.htm (emphasis added).

The Court of Appeals' inclusion of the intangible, non-economic "right[ ] to seek medical services," Pet. App. 29a, within the meaning of "property" for purposes of the Hobbs Act could have a disturbing spillover effect on extortion under color of official right. Substituting certain intangible, non-economic rights for "money" in the Justice Department's description of the "usual fact situation for a Hobbs Act charge under color of official right," could lead to unintended results. It would also leave the "outer boundaries" of extortion under color of official right "ambiguous," and ultimately might even "involve[ ] the Federal Government in setting standards of . . . good government for local and state officials . . . ." *McNally* v. *United States*, 483 U.S. 350, 360 (1987).

This Court has never interpreted "property" under the Hobbs Act to include intangible, non-economic rights such as the "right[ ] to seek medical services," Pet. App. at 29a. Moreover, it has held that the mail and wire fraud statutes do not apply to similar kinds of intangible rights. *See Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) ("But far from composing an interest that 'has long been recognized as property,' these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate.") (quoting *Carpenter*, 484 U.S. at 26); *McNally*, 483 U.S. at 360–61.

Because the Hobbs Act does not reach such non-economic rights as the "right[ ] to seek medical services," Congress passed the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), Pub. L. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C § 248 (2000)), to protect access to reproductive health clinics. Attorney

General Janet Reno testified in support of enacting FACE. After reviewing the limited potential applicability of 42 U.S.C. § 1985(3) to "interference with abortion rights" after *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Attorney General testified that the Department of Justice had not "been able to identify *any other Federal law that would be generally applicable to private interference with a woman's right to choose.*" *The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Senate Committee on Labor and Human Resources*, 103d Cong. 10 (1993) (emphasis added) (statement of Attorney General Janet Reno). In an extended prepared statement addressing, *inter alia*, "[t]he inadequacy of existing federal law," *id.* at 14 (emphasis removed) (prepared statement of Attorney General Janet Reno), the Attorney General did not mention the possibility of applying the Hobbs Act to abortion protest activity. *See id.* at 14–16. For similar reasons, the National Association of Attorneys General adopted a resolution asking "Congress to adopt legislation designed to protect women, physicians and other health personnel from violence aimed at family planning clinics across the country where abortions are performed, without unduly infringing on the right to peaceful protest . . . ." *Id.* at 164 (annex to statement of Robert Abrams); *see id.* at 163 (citing *Bray*). If the Hobbs Act, and thus civil RICO, were as broadly applicable as Respondents now assert, FACE would have been unnecessary.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

WILLIAM H. PRYOR JR.
Attorney General of Alabama

CHARLES B. CAMPBELL*
Deputy Solicitor General
Counsel of Record *

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for *Amicus Curiae*, the State of Alabama

(Additional Counsel Listed Inside Front Cover)

July 12, 2002

Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

Nos. 01-1118, 01-1119

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*,

Respondents.

On Writs of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF EMILY LYONS IN SUPPORT OF RESPONDENTS

PAMELA L. SUMNERS*
5443 N. BROADWAY
SUITE 2-S
CHICAGO, IL 60640
(773) 271-8324
Counsel for Emily Lyons

*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ABBREVIATIONS KEY iv
INTEREST OF THE *AMICA CURIAE* 1
SUMMARY OF THE ARGUMENT 4
ARGUMENT 6

I. VIOLENT CRIMINAL ACTIVITY IS NEITHER PROTECTED SPEECH NOR HEROIC DISSENT. 6

II. PUNISHING CRIME EFFICIENTLY AND UNIFORMLY IS NOT A STATES' RIGHTS ISSUE 12

III. OUR SYSTEM DEMANDS THAT WE TRUST OUR CITIZENS WITH ACCESS TO THE COURTS AND AS JURORS 15

CONCLUSION 22

TABLE OF AUTHORITIES

Adderly v. Florida, 389 U.S. 39 (1966) 8
Brown v. Louisiana, 383 U.S. 131 (1966) 8
Madsen v. Women's Health Center,
512 U.S. 753 (1994) 17, 18

Statutes

91 Cong. Rec. 11,901 (1945) 9
91 Cong. Rec. 11,902 (1945) 9
91 Cong. Rec. 11,903 (1945) 14
91 Cong. Rec. 11,907 (1945) 9
91 Cong. Rec. 11,910 (1945) 10, 14
91 Cong. Rec. 11,911 (1945) 13, 14, 15
91 Cong. Rec. 11,912 (1945) 6, 12
18 U.S.C. § 1951 ..... *passim*
18 U.S.C. § 1961 *et seq.*. ..... *passim*
42 U.S.C. § 1981 20
42 U.S.C. § 1983 20
42 U.S.C. § 1985 20

Other Sources

Speech of Emily Lyons, "*To Hell and Back*,"
reprinted at www.plannedparenthood.org/political arena/violence/emily.html 2
George Orwell, "Politics and the English Language,"
in *The Orwell Reader* (1984 ed., HBJ:
New York) 8
Carol Robertson, "Dog Sniffs Trace of Explosives in Vacant Home," The Birmingham News (July 18, 1998) 12

Howard Sitkoff, *The Struggle for Black Equality*
(Harper Collins Ltd. 1993) 8
Southeast Bomb Task Force, FBI Home Page, at
http://www.fbi.gov/majcases /rudolph
/rudolph1.htm 4
"Town Divided over Eric Rudolph: Some in Andrews Say They Would Not Turn the Bombing Suspect in,"
The Associated Press (Jul. 19, 1998) 12
2000 National Clinic Violence Survey Report
(Feminist Majority Foundation)
(released Jan. 22, 2001), available at
http://www.feminist.org/research/cvsurveys
/clinic_survey2000.pdf17 17
Rachel Zoll, "Clergy Split over Fugitive,"
The Associated Press (Jul. 21, 1998) 13

ABBREVIATIONS KEY

PA	Appendix of Petitioner Operation Rescue
PX	Respondent's Exhibits at Trial (Plaintiffs' Exhibits)
RA	Respondents' Appendix in the Seventh Circuit (Appendix to Plaintiffs-Appellees' Brief)
R	Record in the Seventh Circuit
T	Trial Transcript in the District Court

INTEREST OF THE *AMICA CURIAE*[1]

At 7:30 a.m. a bomb that had been placed in a potted plant outside the clinic I worked in exploded about 15 feet from where I was standing. Someone who considers himself to be pro-life murdered a police officer.

The pipe bomb contained dynamite and nails. I am often asked what my injuries were. I usually ask them, "How much time do you have?" I had first, second, and third degree burns. The trauma surgeon described it by saying that I had hundreds of wounds. He had served in Desert Storm and had seen others who had been bombed. He was shocked to see a bombing victim back in the United States.

Metal tore my left eye to the extent that it had to be removed. Metal also shot into my right eye. After several operations and months of waiting, I am able to see well enough to read a little, but my sight will

---

[1] No counsel for any party had any role in authoring this brief, and no persons other than *amica curiae* and her counsel made any monetary contribution to its preparation and submission. Written consents from the parties to the filing of the *amicus* briefs in this case are on file with the Clerk of the Court. Counsel of record for *amica curiae* is a member of the Alabama bar.

never be like it was. My face, eye sockets, and teeth were broken, my left ear was ruptured, my right hand was mangled, a hole about the size of a fist was torn in my abdomen, exposing my intestines. Both knees were so full of nails that they had to be opened and the nails cleaned out before they would move again. The skin was torn off both shins, exposing bone and requiring skin grafts. Both bones in my lower left leg were shattered, and the doctors feared amputation of one leg. I had dozens of complete nails inside my body, and hundreds of metal fragments and other debris. The blast was so strong it shredded my clothing and blew my shoes off.

> *I have had 12 operations this year[2] and expect many more next year. As a result, I am a trained nurse with 20 years experience who cannot write, read or stand for long periods of time.*

Speech of Emily Lyons, "*To Hell and Back*," *reprinted at www.plannedparenthood.org/political arena/violence/emily.html.*

Emily Lyons has an interest in seeing that the terrorist who caused her horrific injuries and any

---

[2] 1998. Further operations followed.

confederates who aided him (criminals who received nothing other than the malevolent satisfaction of shutting down the Birmingham clinic and maiming and killing its workers) are punished, including under federal statutes. As a clinic worker and a survivor of the Birmingham clinic bombing, she is deeply troubled by Petitioners' attempts to cloak violence in the garb of protected expression and to invoke "States' Rights" to subvert individual rights. Ms. Lyons, having filed suit to prevent the suspect in the Birmingham bombing from profiting from his wrong – if he is ever caught and his guilt established – also has abiding confidence in the jury system that Petitioners and their *amici* disparage in their filings with this Court. She has an interest in vigorous prosecution against crime such as she endured and, as an Alabamian, has an interest in access to the jury process that the Alabama Attorney General has evinced reservations about in his *amicus* brief in this case.

Emily Lyons simply reported to work at the women's clinic where she had served for four years, New Woman/All Women in Birmingham, Alabama, on January 29, 1998. No one asked her if she consented to trade her eyesight or physical vitality for the privilege. Having endured the horror of that day and the horror of repeated surgeries to return to her a fraction of her former body and life before that day, she retains the courage and the belief in the rule of law to caution her fellow citizens: "Do not allow anyone or anything, be it fear or intimidation, to make you lose sight of the main goal – to provide and support a woman's right to reproductive health as they see

fit." *Id.*[3]

SUMMARY OF ARGUMENT

This case is not a judicial plebiscite on the right to peaceful protest activities or on the allocation of federal

---

[3] Eric Robert Rudolph, the man that the FBI considers the murderer of Birmingham police officer Robert Sanderson and the maimer of Emily Lyons, was charged in February 1998. The Birmingham bombing capped Atlanta's trilogy of terror directed against internationalism, reproductive health service providers, and lesbians.

On Saturday, February 27, 1996, at 1:00 a.m., a caller dialed 911 from a pay phone and reported, "There's a bomb in Centennial Park. You have 30 minutes." Twenty minutes later, the military-style backpack placed under a bench in the park where an estimated 50-70,000 milled about during the Atlanta Olympics exploded. The blast killed one person and injured 100 others. *See Southeast Bomb Task Force*, FBI Home Page, http://www.fbi.gov/majcases /rudolph/rudolph1.htm. Rudolph was charged in the bombing October 14, 1998. *Id.*

The bomb at Atlanta's Sandy Springs Professional Building on January 16, 1997 used 3 1/2" pounds of 1 1/2" long flooring nails, 100 feet of twisted galvanized wire, and dynamite. The Sandy Springs Professional Building housed the Northside Family Planning Clinic. Several people were injured, including police officers. *Id.* The bomb that caused the injuries was an anti-personnel device, timed for a second explosion to harm the rescuers. Rudolph was charged in this bombing October 14, 1998. *Id.*

The Otherside Lounge, an Atlanta lesbian bar, was bombed February 21, 1997. That bomb used 6 1/2" pounds of 2" long nails, twisted galvanized wire, and between 30 to 50 half-pound sticks of dynamite. Rudolph was charged in that bombing October 14, 1998. *Id.*

versus state powers even though Petitioners and their *amici* labor mightily to transform it into one.

Contrary to Petitioners' suggestion, bombs, blockades and blitzes of women's health clinics share no kinship with protected forms of nonviolent expression epitomized by the civil rights sit-ins that are seared into our nation's conscience. The truth is that bombers, brawlers, and blitzers of women's health clinics that provide abortion services are the very antithesis of the civil rights heroes with whom Petitioners equate them. Those who plant bombs or use clubs, fists, violent blockades, or nefarious means to express their dissent from this Court's substantive due process jurisprudence are criminals who should be punished as criminals, however sincere their beliefs.

Moreover, Petitioners' suggestion that their position nurtures federalism is either such a meaningless abstraction that it is tantamount to fetishism, or is a transparent justification for a desire not to enforce the law uniformly for all Americans – and thereby to weaken a national commitment to safe, legal abortions. Architects and purveyors of violence, whether of the degree Emily Lyons endured or of the degree the jury found in this case, should be punished with the full weight of the law, including federal statutes. "States' Rights" should not be invested with talismanic properties to ward off the force of available federal law, as Congress recognized decades ago in enacting the Hobbs Act over the objections of those who cited the very States' Rights rationale urged by Petitioners today.

Finally, true to our national values, we must trust

our citizens with access to causes of action and to the courts that Petitioners and their *amici* resist. We must trust them, as litigants and as jurors, to distinguish substance from shadow and to be worthy of the sovereignty they enjoy. Anything less than respect for the rights of citizens and the powers our system confides to them is contemptuous toward the very premise of self-government.

I. VIOLENT CRIMINAL ACTIVITY IS NEITHER PROTECTED SPEECH NOR HEROIC DISSENT.

Petitioner Operation Rescue surmises that because a jury found "only" four acts of violence in the course of deliberating, its good judgment is somehow suspect; the remedies it sanctioned are, accordingly, heavy-handed, naive extensions of the federal statutes whose application is challenged here. (Pet. Operation Rescue's Br. ("OR Br.") at 3, 4 n.8.)[4] The plain fact is that the jury in this

[4] Interestingly, Operation Rescue concedes that the same jury that found these acts of violence *rejected* any notion that liability could be imposed for speech unaccompanied by violence or violation of law, yet Operation Rescue refuses to acknowledge that this in itself demonstrates the falsity of its theorem that a jury cannot be trusted to distinguish punishable threats from protected speech. (*See* OR Br. at 5 n.10.) Certainly, the same jury that appreciated this distinction credibly demonstrated that it understood, as Alabama's Representative Hobbs did in authoring the Act that bears his name, that crime is crime, and speech is speech. (*See* 91 Cong. Rec. at 11,912) (1945) (statement of Rep. Hobbs). It is an insult to the work of that jury to preface a description of its finding of four acts or threats of violence with the word "only" – just as it would be to

case was not seduced into conflating violent, illegal activities with nonviolent expressive protest despite Petitioners' invitations. It did its job of parsing the distinction between vehemence and violence, dissent and destruction.

Operation Rescue appropriates the mantle of the Civil Rights Movement to cloak tactics never countenanced by that movement. It wears the democratic constitutionalist's robes before this Court, but only by way of camouflage. Its rhetoric is not reality.

In Operation Rescue's rhetorical world, its own description of itself in other fora as a "pro-life mafia" is recast here as a metaphor for "activism, not violence." (OR's Br. at 2 n.2.) Petitioners undeniably have a right to try to wriggle out of a metaphor that is irreconcilable with the sober, law-abiding image they hope to portray here, but such revisionism should be noted for the Orwellian feat

trivialize the charges against Eric Rudolph with the observation that he is a suspect in "only" four bombings.

Not surprisingly, given Operation Rescue's apparent disdain for the workings of the jury system, it also trivializes the subject matter of the jury's work: protecting women's constitutional right to reproductive health care without fear or intimidation. Apparently blinded to the requirements of the law by zeal, it contends, "Petitioners were not alleged to have obtained any tangible property … or any intangible property like trademarks or stocks – but *only* to have interfered with the rights of women and the business of abortion." (OR Br. at 4) (emphasis added). In Operation Rescue's view, preventing access to health services, including through violent means, is " 'mere' interference with rights." (OR Br. at 7.) It would appear that it is this Petitioner, not the jury it impugns, that strikes a cavalier attitude toward enforcing constitutional guarantees.

that it is: "the defense of the indefensible." George Orwell, "Politics and the English Language," in *The Orwell Reader* at 363 (1984 ed., HBJ: New York).

In this rhetorical world, the Civil Rights sit-ins, the objective of which was to *secure* access to public accommodations on the same terms as white citizens, are mischaracterized as blockading whites from access to the lunch counters just as Petitioners blockaded clinic access. (OR's Br. at 26-27.) But the truth of the desegregation sit-ins cannot be revised: the protestors wanted a space at the table, not to keep other patrons from theirs. The sit-in manual commanded: "Don't strike back, or curse if attacked … Don't block entrances." *See* Howard Sitkoff, *The Struggle for Black Equality* 67 (Harper Collins Ltd. 1993).

This Court knows the difference between seeking access and blocking it, having upheld the right "in a peaceable and orderly manner to protest by silent and reproachful presence,[5] in a place where the protestant has every right to be," *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), while allowing to stand the criminal-trespass convictions of 200 students who blocked access to the jail to protest the arrest of civil rights demonstrators. *Adderly v. Florida*, 389 U.S. 39 (1966). The tactics Petitioners seek to defend call to mind not the lunch counters of Greensboro, but George Wallace blocking the doors at Tuscaloosa.

---

[5] Or, it should be noted, to chant, speak, counsel or attempt to persuade, consistent with reasonable time, place and manner constraints. Threats of bodily harm are not reasonable.

Continuing in its campaign of misdirection, Petitioner Operation Rescue insists that the Seventh Circuit's construction of RICO "would make a racketeer out of Martin Luther King, Jr." (OR Br. at 7.) Gandhi, too, would be an extortionist. (OR Br. at 44.) [6] "Social protest," it reminds us, "has a long and revered history in this nation." (OR Br. at 28.)

Violence, too, has a long history in this nation, although what we revere, and what has sustained us, is our fidelity to the rule of law that punishes it. Contrary to Operation Rescue's insinuation, it is not "social protest" that we punish when we punish violence. Social protest does not mangle bodies. Gandhi had no gunpowder.

---

[6] This is not a novel form of argument. In floor debates on the Hobbs Act, some representatives (who also objected to passage based on States' Rights) conjured a parade of horribles about the Act's alleged chilling effect on legitimate protest activities. Representative Celler predicted that union strikes, labor picketing, hurling the "scab" epithet, and even the collective bargaining process itself would fall within the Act's definition of "violence" or "force." (91 Cong. Rec. at 11,901)(statement of Rep. Celler)(1945). He predicted that anyone who voted at a union meeting to strike would meet federal felony charges; indeed, he predicted that union members could be found to have "conspired" to commit the "felony" of exercising their legally protected labor rights. (*Id.* at 11,902).

Such use of the propagandist's tool was rebuked by Representative Fellows of Maine, who wryly observed of similar rhetorical excesses, "In common law pleading we would call that something akin to a departure. I allege that a man has converted to his own use my horse and he replies that his grandmother is a fine woman." (91 Cong. Rec. at 11,907) (statement of Rep. Fellows) (1945).

Martin Luther King, Jr. did not block white citizens from exercising the franchise by burning the voting booth or forcing them to run a gauntlet of angry African-Americans hurling threats or fists at them. Fifty-lb. sticks of dynamite, galvanized nails, and anti-personnel backup bombs are not political tracts.

The rhetorical sleights-of-hand that characterize Operation Rescue's image-sculpting provide insight into why it chose to compare the violent persons in its ranks to those peaceful protestors who marched over Selma's Edmund Pettus Bridge. Operation Rescue is two-faced Janus, woundedly protesting its moderation here while presenting quite another face to the troops. Clinic invasions and blockades, initially characterized for insiders as martial "blitzes" at "abortuaries" were revised into Clara Bartonesque "rescues" for public and judicial consumption. (*See* PX797B, 801 at 13-14; 1303, T1018.) When the public relations antennae were more relaxed, however, PLAN members continued to justify bombings as "necessary defense." (*See* PX713.) Tellingly, Petitioner Scheidler, posing in front of a burned-out clinic, described the photograph as a "great scene." (PX719.)

In this Court, Petitioners may liken themselves to the heroes of this nation's epic nonviolent struggle for an end to racial disenfranchisement, but elsewhere, unretouched by the revisionist brush, Petitioner Scheidler scorns as spineless those ideological compatriots who condemn violence as a means to ending legal abortion. (*See* PA217; T1511-12, 3936, 4144, PX801 at 13.) Elsewhere, he has spoken of his "virtual army" for whom "the abortion clinic door means nothing," and has advised

doctors who might view his public threats as exactly what they are to flee to the mountains. (PX801 at 19; PA211.)

These words match the tactics of PLAN conspirators in their virulence. Self-evidently they bear no resemblance to the words or deeds of the Reverend King. Nor can they be reconciled with the image of the champions of robust public debate that PLAN participants project here.

Those who "express" their protest of abortion with fists, projectiles, and bombs do not stand in any venerated first amendment tradition. They are in fact criminals, despite Petitioners' apologia for them. (*See* OR Br. at 28 (lamenting that Seventh Circuit's opinion treats those who express dissent through violence as criminals); Pet. Scheidler's Br. at 15 (objecting to prison sentences for Hobbs Act violations).)

Presumably, in Petitioners' view, the purity of the criminal's commitment to his principles means that his deeds should go unpunished. Punishing crime regardless of the actor's motivations, it warns, would snare what popular understanding would brand as "politically correct" activists, too, such as animal-rights or anti-nuclear activists. (*See* OR Br. at 44; Scheidler Br. at 35.) The contention about animal-rights and anti-nuclear activists is among the few unassailably true statements in Operation Rescue's brief.

To the extent that, as Operation Rescue speculates, PETA or anti-nuclear activists acquire dynamite or bombs and plan to use them to demonstrate their disdain for furriers or power plants, they should be treated as criminals regardless of their views about the morality of animal

vivisection or global ecology. (*See* OR Br. at 44.) Any deviation from the neutral enforcement of laws punishing terroristic acts because of sympathy with the actor's viewpoint does violence to the rule of law.

That evenhandedness is a good thing on which the integrity of our legal system depends, that we cannot elect to punish some terrorists because we appreciate their sincerity while we would punish others, appears to have eluded Petitioners. What is good for PETA is good for Operation Rescue, or, as the sponsor of the Hobbs Act put it, "Crime is crime, no matter who commits it." (91 Cong. Rec. at 11,912) (statement of Rep. Hobbs) (1945).

II. PUNISHING CRIME EFFICIENTLY AND UNIFORMLY IS NOT A STATES' RIGHTS ISSUE.

The search for Eric Robert Rudolph in connection with the Birmingham clinic bombing was federalized. In mid-July 1998, Rudolph was seen in the wilds of North Carolina's Nantahala National Forest. In the small mountain town of Andrews, where residue of explosives was found in a vacant house in which Rudolph is believed to have hidden, residents were divided over whether he should be considered an outlaw or the hero in a struggle with federal authorities. *See Carol Robertson, "Dog Sniffs Trace of Explosives in Vacant Home," The Birmingham News at 1 (July 18, 1998); "Town Divided over Eric Rudolph: Some in Andrews Say They Would Not Turn the Bombing Suspect in,"* The Associated Press (Jul. 19, 1998). Some clergy urged parishioners to volunteer

information to the authorities, while others stated that they would not condemn any local citizens who helped the bombing suspect to evade federal capture. *Rachel Zoll, "Clergy Split over Fugitive,"* The Associated Press (Jul. 21, 1998).

That a person suspected of using bombs rather than tracts as his vehicle for "expression" should have assumed the status of a valiant warrior against federal power is one among many perverse entries in the States' Rights lexicon. That half the residents of Andrews should consider resistance to all things federal a justification for harboring a bombing suspect demonstrates the enduring cleavage between "Nation" and its constituent parts. That cleavage has been cynically exploited in Petitioners' filings in this Court.

Whatever the theoretical or genuine governance virtues of American federalism, the State's Rights mantra invoked by Petitioners and their *amici* is a *non sequitur* when uttered in opposition to the Hobbs Act or to the constitutional right to choose to have an abortion. (*See* Pet. Scheidler Br. at 33-34; OR Br. at 47-48; Br. of *Amici* General Pryor *et al.* at 10, 17.)

Congress considered and rejected ostensible federalism concerns when it passed the Hobbs Act. The Hobbs Act was authored by an Alabamian and shepherded through floor debates by a Texan who noted trenchantly that picking the side of criminals was a poor choice for making a stand for States' Rights. (91 Cong. Rec. at 11,910) (statement of Rep. Sumners). A Tennessean reminded his colleagues that some subjects of congressional notice were properly noticed. (91 Cong.

Rec. at 11,911) (statement of Rep. Jennings).

Then, as in this Court today, "States' Rights" was deployed as a tool of misdirection. A review of the legislative history demonstrates that the same disingenuous polemic was at work in the 1945 floor debates as in this Court today.

Representative Welch vigorously and explicitly accused Hobbs Act supporters of being anti-States' Rights:

> This proposed law is an acknowledgment by its proponents that law and order has broken down in the sections of this country they represent. Is it true that the very people who elect them to Congress to make laws also elect State, county, and city law enforcement officers who are weaklings who fail in their duty to enforce laws? Do they elect judges who fail in their duty to impose proper penalties for law violation?

91 Cong. Rec. at 11,903 (statement of Rep. Welch).

A belief in the rule of law and in the efficacy of the national government to legislate on matters of national scope prevailed over the views of Representative Welch and his allies. The States Rights mantra, though chanted copiously, was rejected in favor of the need to protect American citizens from criminals in uniform fashion: "[T]his bill applies to every citizen under the American flag, whoever he may be, wherever he may live or to whatever organization he may belong. … Our people must be made secure by law. They are entitled to that

protection–we must not fail them." (91 Cong. Rec. at 11,911) (statement of Rep. Springer).

In the end, Congress legislated based on its recognition that crime is crime, and citizens are entitled to protection from it.

III. OUR SYSTEM DEMANDS THAT WE TRUST OUR CITIZENS WITH ACCESS TO THE COURTS AND AS JURORS.

In enacting the Hobbs Act, Congress rejected hyperbolic fulminations of precisely the sort pressed here. Petitioners and their *amici* urge this Court to embrace their self-serving conjectures of dire consequences if this Court does not act swiftly to slam the door on private actions under RICO predicated on violations of the Hobbs Act. Their inapposite and exaggerated speculations are eerily similar to those rejected by Congress in its debates on the Hobbs Act decades ago. History has demonstrated that the passage of the Hobbs Act has not chilled the exercise of free speech, even hateful or loathsome speech protected under the first amendment.

As noted, Petitioners have purportedly conjured their specters for the sake of unchilled speech, unfettered dissent, or a mere reflex toward "federalism" regardless of whether the Hobbs Act or RICO as applied to violent activity has any actual implication for peaceable free expression, the systemic allocation of power, the structural integrity of government, or the fostering of democracy that federalism is intended to promote. It is jarring, then, to discover that the subtext of these arguments – all about

values which putatively enhance the rights of *individual citizens* – is a profound distrust of those same individual citizens.

The jaundiced eye with which Petitioner Operation Rescue views the ability of any jury to sift free speech from threats and violence has been noted already. It is perhaps less than surprising that an adversary which sought to confuse sticks and stones with mere words in hopes of bamboozling a jury would resent that the jury was not credulous enough to succumb to such obfuscations.[7] But it is startling that a few chief law enforcement officers of states – even if only a handful of states – apparently believe that punishing governmental actors for wrongdoing is poor social policy.

The brief of *amici* General Pryor *et al.* objects to allowing a RICO cause of action against state officials who conspire to break the law, who have a pattern of breaking the law. Allowing citizens to state a cause of action against habitual violators of citizens' rights is portrayed as

---

[7] Operation Rescue reasons that RICO remedies are best confided to the Attorney General of the United States because "private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government." (OR Br. at 24.) Private parties cannot be trusted to refrain from "waging political or commercial warfare against [their] adversaries." (*Id.*) Operation Rescue fails to appreciate that political actors have political motivations, that elections herald vicissitudes in law-enforcement priorities that may foreclose individually aggrieved citizens from vindicating their rights, and that the "warfare" waged here was waged by PLAN – a warfare that private parties and a jury resolved through the peaceful process of court action.

persecution of public servants that interferes with the efficient discharge of their duties. (*See* Br. of *Amici* General Pryor *et al.* at 12 & n.6.) No disclaimer is offered for civil rights suits, no recognition that meritless suits are judicially euthanized early is made.

Behind the professed solicitude for efficient government unmolested by the governed is suspicion of ordinary citizens' motives. It is an odd thing that purported champions of rights that attach to citizens and not to governments–rights of dissent and free speech[8] – mistrust the ability of law-abiding citizens to go about their civic business of bringing or impartially determining suits based on existing law. It is decidedly odd that the chief law enforcement officer of any state would agitate for *fewer* protections for citizens and *less* punishment for lawbreakers. This is particularly striking in view of the fact that effective law enforcement, including the realistic prospect of being caught and punished, has been proven to decrease crime at women's health clinics that perform abortions. *See 2000 National Clinic Violence Survey Report* (Feminist Majority Foundation) (released Jan. 22, 2001), available at http://www.feminist.org/research/cvsurveys/clinic_survey2000.pdf17, *at 5.*[9]

---

[8] *See* Br. of *Amici* General Pryor *et al.* at 7 ("The application of civil RICO to political or social protest activities has a substantial chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further.")

[9] The survey defined violence as: blockades, invasions, bombings, arsons, chemical attacks, stalking, physical assaults,

Just as Petitioners insist that juries cannot competently distinguish protest from projectiles, *amici* Attorneys General invite the Court to "imagine" a citizenry lured by RICO's treble-damages provision to sue about administrative and regulatory decisions. (Br of *Amici* Pryor *et al.* at 11-12.) As an aid to the exercise of imagination, they point to suits about no-smoking ordinances. (*Id.*) Not one of the suits they cite, however, is based on a RICO or Hobbs Act cause of action; every one of them is based on the law of a particular state.[10]

Nonetheless, having picked a wildly inapposite example to illustrate the imaginary point, *amici* argue that

---

gunfire, bomb threats, death threats, and arson threats. *2000 National Clinic Violence Survey Report* at 5. The survey report specifically identifies as among the deterrence components of "effective" law enforcement the enactment of the Freedom of Access to Clinic Entrances (FACE), this Court's decision in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), and this Court's earlier decision in this very case. *Id.*

The correlation between violence and weak enforcement is apparent in this case, as Respondents note in their citations to various materials of record. (*See, e.g.*, T3938, 4815-16; PA 123.) Even with a decrease in violence from 1994-97 levels, 20% of clinics continue to experience the violence documented by the survey. (*Id.*)

[10] Perhaps realizing that the example does not illustrate the hypothetical danger of a bloated RICO because none of the cases is in fact a RICO or Hobbs Act case, *amici* concede that if any of them were, the Hobbs Act's *mens rea* element would defeat the cause of action. (*See* Br. of *Amici* Pryor *et al.* at 12.) Thus, *amici* admit in their own brief that they have raised a wholly spurious issue; while the perils of secondhand smoke may be many, they do not include liability under RICO.

the availability of damages under the federal statutes exposes public officials to liability for the "lawful exercise of their discretionary functions." (Br. of *Amici* Pryor *et al.* at 12.) They imagine RICO liability for zoning actions, permit actions, environmental regulations "and so on" (*id.*), even while they concede that their imaginary liability is imaginary precisely because the *mens rea* and qualified immunity defenses would negate liability. (*Id.*) They do not mention the dispositive defenses of legislative immunity, the political-question doctrine, and other defenses and sole remedies that may attach to regulatory and administrative actions.

Since *amici* recognize that in fact RICO or Hobbs Act liability cannot exist for no-smoking ordinances, zoning, environmental, or administrative rules (conceded by *Amici* Pryor *et al.* at 12), it must be that the false example cloaks the true concern. The true concern involves those citizens who present cases of official malfeasance compelling enough to move the near-Sisyphean obstacles of the various immunity doctrines. Such cases that get to a jury and rightly prevail, apparently viewed as nuisances, are euphemistically described as those in which "defenses were unsuccessful." (*Id.* at 12.) A desire by attorneys general to protect wrongdoers on the public payroll can only be regarded as contemptuous toward citizens.

These same sentiments about the costs of litigation and the potential exposure of the public fisc for public agents' serious wrongdoing could be expressed about the civil rights laws to which our citizens and our judiciary are rightly committed. Liability exists under those laws, as

well, and the state must invest in defense of them. It would be impolitic, however, for *amici* to question in this forum why an African-American might have recourse to monetary damages, and even to multiple civil rights causes of action if his rights are violated by his government. Allowing a civil rights cause of action at all hazards liability, and providing for multiple causes of action no doubt lengthens a trial and increases expense.[11] Such an argument, given the pains our nation and its citizens endured to secure those legal protections, would shock and shame us.

Amici's objection to the fact that government is obliged to defend against lawsuits by citizens attempting to vindicate their rights simply cannot be satisfied in a democratic polity or in a polity that values civil rights. The only failsafe way to accommodate General Pryor *et al.*'s discomfort with citizen suits against government, whether about zoning decisions or police officers' billyclubs, is to decree sovereign immunity. If the king can do no wrong, it does not matter whether his wrong was negligent, stupid, or malicious. Citizens would have no opportunity to test whether their servants were entitled to discretionary function or qualified immunity, and juries to determine state liability would be superfluous.

This Court has addressed the limitations of sovereign immunity many times precisely because our government is not a monarchy. Our president, senators,

---

[11] *E.g.*, 42 U.S.C.§ 1981; 42 U.S.C.§ 1983; 42 U.S.C.§ 1985. These statutes are a mere starting point for causes of action under which an aggrieved African-American might sue his government.

city councilors, wardens, bureaucrats, and police officers sometimes commit grievous wrongs proscribed by both federal and state law. When they do, the sovereign people may sue and punish them, exacting the penalty through the decree of a jury of their peers.

Unlike Petitioners and their *amici*, our Founders trusted citizens more than they trusted government. That is why we have the first amendment that Petitioners and their *amici* purport to champion and why we allow ordinary citizens access to the courts that Petitioners and their *amici* wish to block. It is also why we have juries, who in addition to being clever enough to separate legal fact from legal fiction in cases like this one, often act as a brake on prosecutorial zeal and as the instrument of calibration in matching the wrong to the punishment. Petitioners and their *amici* repeatedly disparage the truly indispensable element of our democracy: the sovereign people. They do not trust them even though Publius did.

People are imperfect, and our democracy is imperfect. But our democratic vision cannot be perfected by withdrawing judgment from the people or retracting their rights in order to repose them in their governors. This realization has served us well since the founding of the Republic, and neither Petitioners nor their *amici* have made any credible argument for why we should forsake our bedrock principles merely because democracy may be messy, expensive, and far more time-consuming than monarchy.

CONCLUSION

Petitioners and their *amici* urge this Court to accept a parade of horribles they have manufactured of whole cloth, ostensibly for the sake of unchilled "speech," for the sake of "federalism," for the sake of efficient government. "Speech" turns out to be a handy cloak for violent action, "federalism" nothing more than a ritualistic invocation of a word divorced from a concept as though its mere utterance demands Pavlovian obedience, efficiency a subterfuge for depriving citizens of the tools for bringing governmental power to heel. While Petitioners and their *amici* profess solicitude for the rights of citizens to exercise their right to free speech, they evince a surprising lack of confidence in the ability of those same citizens to judge impartially the unsubtle difference between speech and thuggery, protest and projectiles.

Congress understood that defense of the indefensible is a poor vehicle for championing free-speech values, just as picking the side of criminals is a poor way of making a stand for States' Rights. Petitioners and their *amici* should be reminded of this.

Respectfully submitted,

PAMELA L. SUMNERS
COUNSEL OF RECORD
5443 N. BROADWAY • SUITE 2-S
CHICAGO, IL 60640
(773) 271-8324
COUNSEL FOR AMICA CURIAE EMILY LYONS

Nos. 01-1118, 01-1119

Supreme Court, U.S.
FILED
SEP 13 2002
CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NARAL FOUNDATION/NARAL, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, CENTER FOR DISABILITY AND ELDER LAW, CHICAGO FOUNDATION FOR WOMEN, HUMAN RIGHTS CAMPAIGN, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL COUNCIL OF NEGRO WOMEN, INC., NATIONAL GAY AND LESBIAN TASK FORCE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, NORTHWEST WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, PEOPLE FOR THE AMERICAN WAY FOUNDATION, RAINBOW PUSH COALITION, INC., SOUTHERN POVERTY LAW CENTER, WOMEN EMPLOYED, AND WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH A. CAVENDISH
SARA N. LOVE
THE NARAL FOUNDATION/NARAL
1156 15th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 973-3000

AMY E. WEISSMAN*
PRESTON GATES & ELLIS LLP
701 Fifth Avenue, Suite 5000
Seattle, WA 98104
(206) 623-7580
**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

Of Counsel:
ELLIOT M. MINCBERG
LAWRENCE S. OTTINGER
PEOPLE FOR THE AMERICAN
WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

September 13, 2002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. REVEREND DR. MARTIN LUTHER KING, JR., MOHANDAS K. GANDHI, AND THE OTHER HISTORICAL CHAMPIONS OF CIVIL RIGHTS TO WHOM PETITIONERS & THEIR *AMICI* COMPARE PETITIONERS DID NOT ENGAGE IN CONDUCT THAT WOULD HAVE VIOLATED THE HOBBS ACT	6
A. The Hobbs Act Penalizes The Wrongful Use of Actual or Threatened Force, Violence, or Fear	7
B. Petitioners Operated PLAN Through A Pattern of Force, Violence, Threats, and Fear	9
C. The Hobbs Act Poses No Threat To Social Protest Not Involving The Wrongful Use Of Force, Violence, And Threats	18
1. Opponents of Segregation	19
2. The Gay Rights Movement	22
3. The Abolitionists	24
4. The Suffragists	25
II. THE FIRST AMENDMENT DOES NOT PROTECT PETITIONERS' PATTERN OF FORCE, VIOLENCE, AND THREATS	26

TABLE OF CONTENTS – Continued

Page

CONCLUSION 30

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) 17

Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) 16, 17

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 28

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941) 29

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 4, 28, 29

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir. 1989) 8

NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001) ..... *passim*

NOW v. Scheidler, No. 86 C 7888, 1999 WL 571010 (N.D. Ill. July 28, 1999) ..... *passim*

Samuels v. Mackell, 401 U.S. 66 (1971) 4

Texas v. Johnson, 491 U.S. 397 (1989) 25

U.S. v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) 25

U.S. v. Arena, 180 F.3d 380 (2nd Cir. 1999) 7

United States v. Enmons, 410 U.S. 396 (1973) 9

United States v. Frazier, 560 F.2d 884 (8th Cir. 1977) 8

United States v. Green, 350 U.S. 415 (1956) 8

United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973) 8

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Tropiano, 418 F.2d 1069 (2nd Cir. 1969) 8

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 28

STATUTES

Hobbs Act, 18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 924 10

PUBLICATIONS

A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. (James Melvin Washington ed., 1986) 2, 18

Adam, Barry D., *The Rise of A Gay and Lesbian Movement* (rev. ed. 1995) 24

Branch, Taylor, *Parting the Waters: America in the King Years 1954-63* (1988) 22

Caner, Phoebe, *Mahatma Gandhi's Spinning Wheel: An Offering from the Intellectual Elite to the Rural Poor* (1999) (unpublished M.S. thesis, University of Washington) (on file with University of Washington Library) 21

Civil Disobedience in America: A Documentary History (David R. Weber ed., 1978) 25

Clendinen, Dudley & Nagourney, Adam, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (1999) 24

D'Emilio, John, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* (1983) 22, 23

TABLE OF AUTHORITIES – Continued

Page

Dalton, Dennis, *Mahatma Gandhi: Nonviolent Power in Action* (1993) 21

Gandhi, Mohandas K., *Limitations of Violence, Selections from Gandhi* (Professor Nirmal Kumar Bose ed., 2nd ed. 1957), *reprinted in Civil Disobedience and Violence* (Jeffrie G. Murphy ed., 1971) 2, 20

Gandhi, Mohandas K., *The Essence of Non-violence, Selections from Gandhi* (Professor Nirmal Kumar Bose ed., 2nd ed. 1957), *reprinted in Civil Disobedience and Violence* (Jeffrie G. Murphy ed., 1971) 20

Katz, Jonathan Ned, *Gay American History: Lesbians and Gay Men in the U.S.A.* (rev. ed. 1992) 23

King, Martin Luther, Jr., *The Words of Martin Luther King, Jr.* (selected by Coretta Scott King, 1996) 20

Sorin, Gerald, *Abolitionism* (1972) 25

Woodward, C. Vann, *The Strange Career of Jim Crow* (3d ed. 1974) 19

INTERESTS OF *AMICI CURIAE*

The NARAL Foundation®/NARAL® and its co-*amici* are organizations committed to promoting civil rights. All share a strong interest in protecting the guarantees of the First Amendment to the United States Constitution and the right to peaceful, non-violent protest as a means of effecting social change. Indeed, most civil rights were secured through exercise of these First Amendment freedoms, and co-*amici* depend on the exercise of their First Amendment rights to advance and protect the freedoms to which their organizations are con mitted. At the same time, all the *amici* want to ensure that forcible, threatening, and violent conduct is not confused with constitutionally protected, peaceful protest, lest the misdeeds of Petitioners and others like them taint and ultimately put an end to *amici*'s and others' efforts to effect social change through legitimate, constitutionally protected means. Descriptions of each of the *amici* are provided in the Appendix hereto.[1]

---

[1] This brief was not authored, in whole or in part, by any counsel for a party. Sara N. Love, one of the authors of this brief, was at one time counsel for Respondents, but is no longer serving in that capacity. No person or entity, other than the *amici curiae*, their members, or counsel contributed monetarily to the preparation or submission of this brief. Counsel for all parties have consented to the filing of all *amicus* briefs.

SUMMARY OF ARGUMENT

The most powerful and successful advocates for social change have advanced their causes by embracing non-violence in word and in deed. Speaking of the struggle for civil rights in perhaps his most well-known address entitled "I Have a Dream," Rev. Dr. Martin Luther King, Jr. proclaimed: "We must forever conduct our struggle on the high plane of dignity and discipline. We must not allow our creative protest to degenerate into physical violence. Again and again we must rise to the majestic heights of meeting physical force with soul force." *A Testament of Hope*: *The Essential Writings and Speeches of Martin Luther King, Jr.* 218 (James Melvin Washington ed., 1986. In that same vein, Mohandas K. Gandhi stated: "I object to violence because when it appears to do good, the good is only temporary; the evil it does is permanent." Mohandas K. Gandhi, *Limitations of Violence*, *Selections from Gandhi* (Professor Nirmal Kumar Bose ed., 2nd ed. 1957), *reprinted in Civil Disobedience and Violence* 97 (Jeffrie G. Murphy ed., 1971). The actions of these men and their followers lived up to their explicit philosophies of non-violence.

In stark contrast, Petitioners Operation Rescue ("OR"), Joseph Scheidler ("Scheidler"), Andrew Scholberg ("Scholberg"), Timothy Murphy ("Murphy"), and the Pro-Life Action League, Inc. ("PLAL") (collectively "Petitioners") operated and managed their enterprise, the Pro-Life Action Network ("PLAN"), through force, threats, and violence to prevent Respondents from exercising their rights. As Scheidler described the enterprise's efforts to eradicate abortion: "You can try for 50 years to do it the nice, polite way, or you can do it next week the nasty way." (Plaintiff's Exhibit 709 (hereinafter "Px")). Branding

themselves the "pro-life Mafia," (Px 647), they participated in a long-standing pattern of engaging in, authorizing, and/or ratifying wrongful acts of violence, threats, and force to put an end to safe, legal abortion. Their conduct included, among other things, violent physical assaults on clinic staff and patients, forcible entry into clinics, the destruction of clinic property, massive threatening and violent blockades, and threats of harm. Unlike Rev. King and Gandhi, then, Petitioners were violent in word and in deed, much like the well-known Mafia whose name they chose to bear.

Petitioners' wrongfully forcible, violent, and threatening conduct constitutes extortion as defined in the Hobbs Act, 18 U.S.C. § 1951. As such, the court below properly found Petitioners liable for, and enjoined them from, engaging in those acts. Petitioners and *amici curiae* Seamless Garment Network et al. ("SGN *Amici*"), however, would have this Court believe that if it upholds the decision below, social protest and civil disobedience as we know them will cease to exist in this country. *See, e.g.*, Brief *Amicus Curiae* of Seamless Garment Network et al. in Support of Petitioners, at 3, 13-25. They could not be more wrong.[2] Their argument conflates the *cause* underlying social protest with the *conduct* aimed at promoting that cause. The ruling below does not prevent Petitioners, the SGN *Amici*, or any other advocates from pursuing and expressing their views on their respective causes. Instead,

---

[2] Equally wrong are the *SGN Amici's* repeated assertions that Petitioners neither advocated nor engaged in acts of violence. *See, e.g.*, Brief of *SGN Amici*, at 2, 6. Those assertions contradict the overwhelming evidence, discussed more fully below.

through the mechanism of a carefully tailored injunction, it prevents Petitioners from using a very narrow set of tools, namely wrongful, violent, criminal conduct, to pursue their cause.

In truth, this case does not concern social protest protected by the First Amendment. As this Court has recognized, "The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982 (quoting *Samuels v. Mackell,* 401 U.S. 66, 75 (1971) (Douglas, J., concurring)). Nor should a picket sign wielded as a weapon to strike a person find sanctuary in the First Amendment. That is what is at stake here, where Respondents have challenged *not* Petitioners' right to advocate through legitimate, protected means of expression, such as leafleting, picketing, and speaking out, but rather Petitioners' wrongful use of violence and criminal activity against Respondents.

Both lower courts appreciated the distinction between Petitioners' protected expression and their nonprotected conduct. The trial court held that: "While the political ends of the [Petitioners] – to convince the public of the need to protect what they characterize as 'unborn children' – are constitutionally protected by the First Amendment, a number of their means – destroying property and threatening violence[3] – are not." *NOW v. Scheidler*, No. 86 C

[3] Petitioners did more than just threaten violence: they engaged in, authorized, and/or ratified a number of violent acts, discussed in more detail below.

7888, 1999 WL 571010, at *16 (N.D. Ill. July 28, 1999). Similarly, the Seventh Circuit Court of Appeals ruled: "[T]he record is replete with evidence of instances in which [Petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts." *NOW v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001).

Petitioners' violence "is the antithesis of reasoned discussion." *Id.* at 707. As such, Petitioners cannot cloak themselves in the mantle of non-violent protest and expression historically (and rightfully) protected by the First Amendment. Petitioners are not the National Right to Life Committee, whose members speak, picket, and leaflet, peacefully and without the wrongful use of violence and threats, to express their opposition to abortion, which activities Respondents have not challenged. Holding Petitioners accountable for their actions will not jeopardize the long tradition of peaceful political protest that is the hallmark of our democracy, but rather will strengthen the First Amendment by encouraging more people to use legitimate means to engage in social protest in lieu of wrongfully using force, threats, and violence to pursue their agendas. For these reasons, the Court should affirm the ruling below.

ARGUMENT

I. REVEREND DR. MARTIN LUTHER KING, JR., MOHANDAS K. GANDHI, AND THE OTHER HISTORICAL CHAMPIONS OF CIVIL RIGHTS TO WHOM PETITIONERS & THEIR *AMICI* COMPARE PETITIONERS DID NOT ENGAGE IN CONDUCT THAT WOULD HAVE VIOLATED THE HOBBS ACT

Petitioners err in accusing the Seventh Circuit of a "cavalier disregard" of the First Amendment that "gives the stamp of approval" to RICO litigation against ideological adversaries. Operation Rescue Petition for Writ of Certiorari, at 10. They wrongly claim that if this Court upholds the Seventh Circuit's decision, RICO actions based on predicate Hobbs Act offenses will proliferate against a wide variety of social protesters, and this country will move toward "totalitarian oppression of dissent." Brief for Petitioner Operation Rescue, at 44. They further assert that under the reasoning of the lower court, the Hobbs Act could have been used against Rev. King, Gandhi, and other exemplars of non-violent social protest. *Id.* at 7. Those claims are nothing more than hyperbole.

Petitioners misapprehend the effect of upholding the Seventh Circuit decision. Rather than quelling social protest, such a ruling from this Court would prevent the self-proclaimed "pro-life Mafia" from wrongfully using force, threats, and violence, prohibited under the Hobbs Act, to stop others from exercising their lawful rights to provide and receive medical attention for a host of conditions, not just pregnancy. Moreover, it would uphold the right of those who oppose abortion to make their views known by lawful means, much as members of the National Right to Life Committee – dismissed by Petitioners as

"wimps" and "lilypads for life" – have chosen to do. (Px 801 p. 13; Trial Transcript 1511-12, 3936, 4144 (hereinafter "TT")). In short, affirmance would honor and continue our nation's long and proud history of civil disobedience, and yet deter PLAN and other mafia-like enterprises from wrongfully using threats and violence to get their way.

A. The Hobbs Act Penalizes The Wrongful Use of Actual or Threatened Force, Violence, or Fear

The Hobbs Act penalizes anyone who "in any way or degree obstructs, delays, or affects commerce . . . by . . . extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). Extortion, in turn, is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[4] *Id.* § 1951(b)(2).[5]

Petitioners' conduct falls squarely within the above definition of extortion, and any suggestion by Petitioners that they have been singled out for legal sanctions based

---

[4] The Hobbs Act prohibition is written in the disjunctive. "For conduct to come within the scope of the Act it may, for example, include either actual force, or actual violence, or the threat of violence, or the engendering of fear of force or violence." *U.S. v. Arena*, 180 F.3d 380, 395 (2nd Cir. 1999).

[5] Because this brief focuses on the element of "wrongful use of actual or threatened force, violence, or fear," *amici* will not undertake a comprehensive examination of the other Hobbs Act elements.

on their views – as opposed to their conduct – is inconsistent with the long history of Hobbs Act prosecutions, many of which involved conduct strikingly similar to Petitioners'. For example, the Fifth Circuit affirmed the conviction of a defendant who made threats to a person, broke a store window, and committed an assault. *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973). The Third Circuit affirmed the application of the Hobbs Act to defendants who rushed into clinic premises, knocked down and injured employees, blocked access to clinic rooms, damaged equipment, pushed and shoved patients, knocked down barricades, and made threatening comments. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349-50 (3rd Cir. 1989). The Fourth Circuit upheld a Hobbs Act conviction where the defendant threatened that the victim "couldn't afford to have [certain people] against" him. *United States v. Santoni*, 585 F.2d 667, 670 (4th Cir. 1978). The Eighth Circuit found that proof that a defendant had attempted to arouse fear by threatening to detonate an explosive device attached to the victim's belt was sufficient proof of attempted extortion to satisfy the Hobbs Act. *United States v. Frazier*, 560 F.2d 884 (8th Cir. 1977). The Second Circuit affirmed the conviction of defendants who threatened to push a business competitor out of the way and warned that he might "get his head broke [*sic*]." *United States v. Tropiano*, 418 F.2d 1069, 1073 (2nd Cir. 1969). All of these decisions are in line with this Court's ruling that using threats, force, and violence to force an employer to pay for unwanted, superfluous, and fictitious work falls within the Hobbs Act. *United States v. Green*, 350 U.S. 415 (1956).

As shown below, Petitioners' conduct was even more serious than conduct found to violate the Hobbs Act in

several of the aforementioned cases, and is properly punishable under the Hobbs Act and RICO.

B. Petitioners Operated PLAN Through A Pattern of Force, Violence, Threats, and Fear

The conduct of Petitioners, through their enterprise PLAN, falls squarely within the definition of extortion under the Hobbs Act and cases applying the statute. PLAN was designed "to put clinics out of business." *NOW*, 1999 WL 571010, at *3 (citing TT 4149). At trial, Respondents presented evidence of numerous incidents of extortionate conduct at reproductive health clinics across the country spanning a period of twelve years. The most salient feature of Petitioners' conduct is the use of actual and threatened force and violence which, in the eyes of this Court and the Solicitor General of the United States, is "*inherently wrongful*." *See* Brief for the United States as *Amicus Curiae*, at 29, and citations therein (emphasis added); *see also United States v. Enmons*, 410 U.S. 396, 399-400 (1973).[6]

PLAN held annual conventions across the country almost every year from 1984 through 1997. *NOW*, 1999 WL 571010, at *4. At those conventions, PLAN leaders

---

[6] The jury made clear, in question 6 of the verdict form, that none of the predicate acts supporting the RICO violation was a mere sit-in "without more." (PA 2 (Verdict Form)); *see also NOW*, 1999 WL 571010, at *10 n.6 ("None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics."). The evidence proved, and question 6 confirmed, that liability was predicated on the wrongful use of threats, force, and violence.

instructed members on tactics to close clinics, agreed to yearlong agendas, (Px 13B, 721, 435A at 7; Plaintiffs-Appellees' 7th Circuit Appendix 96 (hereinafter "PA")), and closed the clinics in the convention area through massive, forcible blockades code named "field training" in order for "everyone to practice what they've learned." *NOW*, 1999 WL 571010, at *4 n.2; *NOW*, 267 F.3d at 694, 703; (PA 96). For example:

- At the 1985 convention, PLAN members agreed to a "unified national agenda" covering May 1985 – April 1986, which they designated "A Year of Pain and Fear for America's Abortion Providers." (Px 721). They directed PLAN members to issue a "Christmas Truce" by writing the reproductive health clinics in their area and threatening them that on December 28, the clinics would have to "close or be closed." *NOW*, 1999 WL 571010, at *4; (Px 726). Scheidler sent letters to all the clinics in Chicago, stating that he would "call to confirm" that the clinic agreed to close. He warned that if they did not, they would be subjected to "non-violent[7] direct action," (Px 729), including

[7] The Court should consider what Petitioners actually *mean* by "non-violent." Incredibly, Scheidler claimed that bombing a clinic does not constitute violence; in his words, "I hardly think [bombing] is violence, since it is against bricks and glass." (PA185). That assertion defies logic and contradicts federal criminal law, which defines a "crime of violence" as one that "has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" or "that by its nature, involves a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3) (emphases added) . As the criminal code makes clear, violence is violence, whether

(Continued on following page)

"entering the clinics, sitting in, blocking the entrance or blocking passages leading to the [procedure rooms]." (Px 726; TT 1019-21). PLAN members in St. Louis and Phoenix also issued similar threats. (Px 801).

- The PLAN leaders, through their 1985-86 agenda, also directed PLAN members to invade reproductive health clinics. (Px 713). In March 1986, Scheidler and other PLAN leaders met in Pensacola and planned a clinic invasion. Two of the leaders promised to invade the clinics, and Scheidler agreed that he too might participate if he could do so without being arrested. (TT 4014-15, 4019-22). The next day, a number of PLAN invaders burst into the clinic. They pushed the administrator down the stairs, causing her severe disk damage. As a result, she had to wear a collar and go to physical therapy for several months. (TT 1469-72). In addition, one of the invaders slammed a NOW escort up against the wall, causing serious injuries. The invaders then destroyed the clinic's medical equipment, while Scheidler was outside with a bullhorn. (*Id.;* Px 664; TT 4022). Afterwards he bragged about and took credit for the invasion, boasting that he had "[s]hut down the abortuary for a couple of days." (Px 670; TT 1508-10; 1022-25). In fact, the clinic was closed for a week. (TT 1473). Scheidler also lauded the invaders for their actions.

the target is a person or a piece of property, such as a clinic or medical equipment.

("Good job, John" (TT 1510); "Joan Andrews was superb" (PA 184)).

- In June 1985, PLAN activists forcibly invaded a clinic in Delaware. The participants destroyed medical equipment, barged into operating rooms where staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. *NOW*, 1999 WL 571010, at *2 (citing TT 663).

- In April 1986, shortly after several clinics had been bombed, Scheidler and three large male PLAN members entered the clinic of Respondent Delaware Women's Health Organization and positioned themselves so that they prevented the clinic administrator, a petite woman who was there alone, from escaping. They refused her requests to leave and commandeered the telephones. Once they trapped her, they told her that they were there to "case the place" because they intended to "close [the clinic] down," and that she had "better find . . . a different job because [she] could be in big trouble." (TT 1151-54).

- Operation Rescue was organized in 1987 at a PLAN leadership council meeting. *NOW*, 1999 WL 571010, at *3. Its stated purpose was to "overwhelm the law enforcement system and gain free access to the clinics without legal consequences." *Id.* The PLAN leadership targeted Cherry Hill, New Jersey, as the site of OR's "field training." (Px 32). At the Cherry Hill blockade, rows and rows of people physically blocked access to the clinic

and overwhelmed law enforcement. (Px 1200D; TT 1042, 4816-17).

- PLAN taught "lock and blocks" at its 1988 convention in Chicago, Illinois. A "lock and block" is "where protestors physically lock their bodies to the doors of clinics or other large objects in front of clinic doors" so that no one can enter. *NOW*, 1999 WL 571010, at *3. This was a tactic that PLAN bragged it "pioneered." (Px 435A at May 13-14, 1991). The "field training" at the end of the 1988 PLAN convention was a lock and block at a local Chicago clinic. *NOW*, 1999 WL 571010, at *4 n.2; (Px 148).

- In 1989, PLAN members organized forcible blockades to occur in nearby Farmington and Livonia, Michigan, during the annual PLAN convention. Hundreds of PLAN protestors closed several clinics. (TT 3854-63; Px 607).

- On April 29, 1989, PLAN organized a "National Day of Rescue," which coincided with the 1989 PLAN convention's "field training." Of this event PLAN bragged that "prolifers in 17 cities didn't need to risk arrest because the clinics were closed down for fear of the upcoming rescues" [blockades]. (TT 1076-77, 3854-63).

- In 1991, PLAN closed clinics in Wichita, Kansas for weeks shortly after PLAN held its convention. *NOW*, 1999 WL 571010, at *4. One witness at trial described how she was trapped in a car in 110 degree heat over the course of two days while Scheidler and other PLAN members screamed at her, banged on the car windows, and lay down in front of the

car to keep it from moving. On the third day, United States Marshals cleared a corridor for the patients to get through the massive crowd. As the patients made their way in, the crowd spat and grabbed at them, injuring at least one patient. (TT 766-780).

- In 1992, in San Antonio, Texas, protestors closed clinics daily in conjunction with the PLAN convention. *NOW*, 1999 WL 571010, at *4 n.2; (TT 4130-31, 4256).

- The force and violence of PLAN blockades were so well known that when PLAN advertised it was coming to Milwaukee, Wisconsin in 1997, the local Planned Parenthood clinic decided to close rather than suffer through the impending PLAN "field training." (Px 288; TT 1877-78).

Scheidler's hotline and the PLAN newsletter proudly reported these events and praised the involvement of PLAN members. *NOW*, 1999 WL 571010, at *4 n.2.

As if this evidence were not enough, Respondents proved other instances in which Petitioners operated and managed PLAN through force and violence:

- In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "Several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt.'" *NOW*, 1999 WL 571010, at *1 (internal citations omitted).

- In Milwaukee, Wisconsin, protestors repeatedly banged on a patient's car as she entered a health clinic parking lot and grabbed at her arms and legs as she attempted to enter the clinic. *Id.*

- In Chico, California, hundreds of protestors physically smashed a clinic administrator and two clinic escorts up against a clinic's entrance doors. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." The glass entrance to the clinic was damaged, and the clinic administrator received bruises on her legs and arms. *Id.* at *2.

- In Los Angeles, California, protesters assaulted a patient who was seeking care at a health clinic as a follow-up to her ovarian surgery. She testified: "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people and they were grabbing their arms and grabbing at me. . . . Then I felt myself going down, and I got scared, real scared." *Id.* One protester hit her over the head with a "big" picket sign. The attack forced open her surgical incision, causing her to bleed from the abdomen, and she had to be rushed to the hospital. *Id.*

Witness after witness testified to the impact that this violence had upon them. A clinic volunteer recounted, "They were . . . shoving and elbowing and smashing. I

mean, they were right within less than an inch of us. . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." A patient testified, "I was hysterical. I was afraid. I thought they were going to kill me." A clinic administrator explained, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified." *Id.* (citing TT 1444, 1522, 663).

In light of the overwhelming evidence adduced at trial, the jury and the district court found that "[t]hese incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants." *Id.* at *3.

The jury concluded that this conduct constituted:

- 21 Hobbs Act violations;
- 25 state extortion law violations;
- 25 attempts or acts of conspiracy to violate federal or state extortion law;
- 4 acts or threats of physical violence;
- 23 violations of the Travel Act; and
- 23 attempts to violate the Travel Act.

(PA 2 (Verdict Form)). Those findings are consistent with the body of case law construing the Hobbs Act, particularly the ruling of the First Circuit Court of Appeals, which faced very similar facts in *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995):

> Appellees used force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinics from conducting their normal, lawful activities. The record also amply shows that Appellees' tactics include the intentional infliction of property damage, and directly result in the clinics' loss of business. *It is difficult to conceive a set of facts that more clearly sets forth extortion as it is defined by [the Hobbs Act].*

Id. at 438 n.6 (emphasis added).

As shown above, Petitioners did more than just make a few threats or block a few doorways. They devised and engaged in a pervasive, nationwide course of conduct designed to intimidate clinic staff and patients into relinquishing their rights and preventing them from carrying out their business.[8] As the Solicitor General recognizes, *see* Brief of United States at 29, "Imposing liability for [Petitioners' conduct] lies at the core of the Hobbs Act," and this Court can uphold the decision below without threatening legitimate means of social protest – means that Petitioners were free to, but did not, choose.

---

[8] Similarly, according to the complaint referred to on page 27 of the Brief for Petitioner Operation Rescue, the anti-fur protesters who were sued under RICO allegedly threw paint on a store, threw acid on the windows, glued the door, threatened "We will burn down your house," and smashed plate glass windows. *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999). These allegations, if true, demonstrate exactly the type of forcible, threatening, violent conduct that the Hobbs Act is intended to address; consequently, applying the Hobbs Act to such conduct is not in any way a distortion of the statute.

C. The Hobbs Act Poses No Threat To Social Protest Not Involving The Wrongful Use Of Force, Violence, And Threats

Petitioners and their *amici* invoke the names of Gandhi, Martin Luther King, Jr., and other champions of civil rights and civil liberties in a vain attempt to transform themselves into modern-day civil rights activists engaged in protected acts of peaceful protest. *See, e.g.*, Brief for Petitioner Operation Rescue, at 7, 44. That comparison belies the fact that Reverend King and Gandhi, unlike Petitioners, did not embrace violence as a tool of social change – in word or in deed – and did not engage in conduct that would have violated the Hobbs Act.

By its terms, the Hobbs Act does not reach social protest that does not involve "wrongful use of actual or threatened force, violence, or fear." For example, even assuming *arguendo* that the actions of civil rights protesters would have satisfied the other elements of the Hobbs Act, Rev. King and his followers did not violate the Hobbs Act because they marched, sang, spoke out, and sat quietly at businesses, without wrongfully using violence or threats. In fact, as the SGN *Amici* acknowledge, most violence, to the extent it occurred, was directed at Rev. King and his followers, who refrained from responding in kind no matter how severe the force used against them.[9]

[9] Rev. King did not endorse the acts of violence committed by some civil rights protesters. In fact, Rev. King taught his followers "not to fight even if attacked." Interview: Martin Luther King, Jr., *Playboy*, January 1965, *reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 352 (James Melvin Washington ed., 1986).

See, e.g., C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974); *see also*, Brief of SGN *Amici*, at 18.

Similarly, the Hobbs Act would not have restrained Gandhi and adherents to his philosophy because their conduct was truly non-violent. Most of the *SGN Amici* would also not be guilty of Hobbs Act violations, nor would most individuals or groups who picket, leaflet, or give speeches.[10] In each of the following examples, the conduct at issue would not have been found to violate the Hobbs Act.

1. *Opponents of Segregation*

OR mistakenly claims that "[t]he court below held that pro-life sit-ins at abortion facilities violate the federal extortion statute." OR Petition at 20. That is not the case. The comparison to non-violent civil rights sit-ins is inapt at best, and a slap in the face to peaceful civil rights advocates worldwide.

Petitioners' conduct directly and unequivocally violates the very principles for which Rev. King stood. Rev. King cautioned us against "succumb[ing] to the temptation to use violence in our struggle for freedom" lest our legacy be "a long and desolate night of bitterness" and "a never-ending

[10] If, however, those organizations cross the line from legitimate means of social protest into punching or knocking down loggers or people wearing fur, or making repeated death threats, they might well be found to have violated the Hobbs Act. In that event, the Hobbs Act would curtail only the threatening, violent aspects of their conduct. Importantly, the activists' right to voice their disagreement through picketing, leafleting, and non-threatening speech, for example, would not be impaired.

reign of chaos." Martin Luther King, Jr., *The Words of Martin Luther King, Jr.* 71 (selected by Coretta Scott King, 1996). He also believed that:

> Violence as a way of achieving racial justice is both impractical and immoral. It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye for an eye leaves everybody blind. It is immoral because it seeks to humiliate the opponent rather than win his understanding; it seeks to annihilate rather than to convert. Violence is immoral because it thrives on hatred rather than love. It destroys community and makes brotherhood impossible. It leaves society in monologue rather than dialogue. Violence ends by defeating itself. It creates bitterness in the survivors and brutality in the destroyers.

Id. at 73. In his pledge to the non-violent movement, Rev. King promised to "[r]efrain from violence of fist, tongue, or heart" – and he honored that pledge. *Id.* at 74.

Mohandas K. Gandhi, like Rev. King, advocated non-violence. As he saw it, "[n]on-violence is the law of the human race and is infinitely greater than and superior to brute force." Mohandas K. Gandhi, *The Essence of Non-violence, Selections from Gandhi* (Professor Nirmal Kumar Bose ed., 2nd ed. 1957), *reprinted in Civil Disobedience and Violence* 95 (Jeffrie G. Murphy ed., 1971). Moreover, he wrote, "I object to violence because when it appears to do good, the good is only temporary; the evil it does is permanent." Mohandas K. Gandhi, *Limitations of Violence*, *reprinted in id.* at 97. In fact, in coining the term *satya-graha* to describe his philosophy, Gandhi wrote:

> [I]t excludes every form of violence, direct or indirect, veiled or unveiled, and whether in thought, word, or deed. It is a breach of *satya-graha* to wish ill to an opponent or to say a harsh word to him or of him with the intention of doing harm. . . . *Satyhagraha* is gentle, it never wounds. It must not be the result of anger or malice. . . . It was conceived as a complete substitute for violence."

Dennis Dalton, *Mahatma Gandhi: Nonviolent Power in Action* 37 (1993) (citation omitted). Moreover, *satyagraha* "excludes the use of violence because man is not capable of knowing the absolute truth and, therefore, not competent to punish." *Id.* at 38 (citation omitted). Matching deed with word, Gandhi responded to the British ban on Indian textiles by reintroducing manual spinning wheels and himself becoming a spinner, instead of engaging in or encouraging wrongful acts of violence or threats in response to British rule. *See* Phoebe Caner, *Mahatma Gandhi's Spinning Wheel: An Offering from the Intellectual Elite to the Rural Poor* 41, 46, 51, 92 (1999) (unpublished M.S. thesis, University of Washington) (on file with University of Washington Library).

Under Rev. King's and Gandhi's philosophy of non-violence, peaceful protest may take many forms, such as peaceful sit-ins, peaceful demonstrations, leafleting, and picketing aimed at persuading. These tactics have been tools of the civil rights movement for decades. Threats of force and violence to physically harm others or destroy property are not part of Rev. King's legacy, and Petitioners' deeds are its antithesis. Petitioners mislabel as "sit-ins" their violent blitzes on America's clinics. The term "sit-in" meant something much different in the early years of the civil rights movement. The civil rights activists of the

1960's sat at all-white lunch counters and in the all-white section of buses to make the point that segregation was wrong, and to open the doors of those and other businesses to people of all races, unlike Petitioners, who sought to close the doors of full-service clinics. While participating in sit-ins, Rev. King's followers were non-violent, peaceful, and even polite. *See, e.g.*, Taylor Branch, *Parting the Waters: America in the King Years 1954-63* 274 (1988). Had Rev. King encouraged his followers to enter a restaurant, barricade the doors, assault the staff, and vandalize the restaurant equipment, his conduct would have been analogous to Petitioners'. But he did no such thing. Similarly, the civil rights strategy of ending segregation without wrongfully using threats and violence to force businesses to close contrasts sharply with PLAN's use of wrongful acts to put clinics out of business, prevent women from obtaining the health care they sought, and cause physical, emotional, and economic harm as needed to do so. *NOW*, 1999 WL 571010, at *3. Consequently, holding Petitioners accountable for their conduct would in no way preclude present-day Gandhis and Kings from speaking out against injustice and engaging in acts of peaceful social protest.

2. *The Gay Rights Movement*

More recently, the gay rights movement has emerged as a leading agent of social change. Gay rights activists have engaged in public education, media campaigns, grass-roots political organizing to support or oppose political candidates and legislation, litigation, marching, and speaking out, *see, e.g.*, John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970*, at 1-5 (1983) (describing

creation of gay rights movement), none of which violate the Hobbs Act.

When the movement began in the early 1950's, gay rights advocates in the Mattachine Society, although often called "militant," engaged in lawful, peaceful means of advancing their cause, such as using the court system to fight police entrapment of homosexuals, sending out press releases, launching a gay-oriented magazine called *ONE*, and leafleting in various communities. *See generally id.* at 54-74, 84-91, 149-175; *see also* Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (rev. ed. 1992). When the Mattachines adopted a more conservative approach in the mid 1950's, *ONE* "strove to keep alive the militant spirit" of the Mattachines by criticizing oppression and discrimination and by publishing articles intended to spur debate. D'Emilio, *supra*, at 87-89. The Daughters of Bilitis, a women's alternative to the Mattachines, pursued public education, participation in research, and changes in the penal code to achieve equality. *Id.* at 102-03. None of these actions violated the Hobbs Act.

Even the well-known evening of resistance at the Stonewall Inn in Greenwich Village, New York was a world apart from Petitioners' years-long siege of our nation's clinics. On that fateful night in the summer of 1969, police officers raided a bar at which mainly gay and transgender individuals were socializing. The patrons of the bar defended themselves against the police raid. *Id.* at 231-32. Although some acts of violence occurred, they were defensive acts brought about in response to the surprise raid. The patrons did not intend to, and did not attempt to, obtain or control another's property.

In recent years, the number of groups advocating gay and lesbian rights has increased, and the diversity within those groups has grown. Members of one such group, Queer Nation, have protested right-wing politicians, held kiss-ins, celebrated same-sex marriages, formed "pink patrols" to protect against street violence, staged peaceful, non-violent demonstrations, and organized a consumer boycott of a restaurant chain that rid itself of gay and lesbian employees. Barry D. Adam, *The Rise of A Gay and Lesbian Movement* 163 (rev. ed. 1995). Similarly, the AIDS Coalition to Unleash Power ("ACT UP") was formed in 1987 to direct attention and funding to the AIDS crisis. Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 547-48, 557-72 (1999). ACT UP members have distributed condoms and safe-sex literature, chanted, hung banners in public places, held peaceful sit-ins at City Hall in New York, and spoken out at political events. *See, e.g.*, Reports available *at* http://www.actupny.org/reports (last visited Sept. 4, 2002). In addition, they have contacted congressional representatives and written letters to corporations. *See, e.g.*, Reports available *at* http://www.actupny.org/reports/congress402.html (last visited Sept. 4, 2002). These activities, while perhaps more confrontational than that of earlier gay rights advocates, did not involve the wrongful use of violence, threats, or force, and did not seek to obtain or control the property of others.

3. *The Abolitionists*

The SGN *Amici* go to great lengths to describe the actions of abolitionist William Lloyd Garrison, who was known for regularly burning the Constitution. Brief of SGN *Amici*, at 14-16. Yet they concede that Garrison's

activity would be protected under modern law. *Id.* at 15. Indeed, burning the Constitution is an unequivocal act of expressive conduct, akin to burning the flag, which this Court has protected under the First Amendment. *See Texas v. Johnson*, 491 U.S. 397 (1989) (finding burning of American flag to be protected). Garrison did not engage in a criminal assault upon a person or another's property when he burned the Constitution, nor did he engage in the wrongful use of threats or extortionate conduct. In fact, Garrison and the members of the American Anti-Slavery Society not only expressly disavowed the use of physical force, but also kept their resolve to eschew violence even as they faced increased violence directed at them. Gerald Sorin, *Abolitionism* 89 (1972).

4. *The Suffragists*

Finally, Petitioners' conduct bears little resemblance to that of Susan B. Anthony and Dr. Alice Paul, two well-known proponents of women's suffrage discussed by the SGN *Amici*. Brief of SGN *Amici*, at 20-23. Dr. Paul and her followers focused their efforts on educating the public about the plight of women, using tools such as speeches, rallies, and leafleting to achieve that objective. Eventually, they burned President Wilson's speeches and burned him in effigy. *Civil Disobedience in America: A Documentary History* 195-96 (David R. Weber ed., 1978). Several of Dr. Paul's followers who picketed the White House were arrested on "arbitrary charges of 'obstructing traffic,'" which led others to ignite symbolic fires outside of the White House "in the face of certain arrest." *Id.* at 196. To express her opinion of the all-male franchise, Susan B. Anthony voted in Rochester in 1872. *U.S. v. Anthony*, 24 F.

Cas. 829 (C.C.N.D.N.Y. 1873). She was convicted of voting fraud for her conduct.

The actions of these women were sometimes criminal, but were not used to obtain or control another's property and did not involve the wrongful use of threats, force, and violence that separates Petitioners from other protesters.[11] Any broad comparison between Petitioners and the suffragists is simply wrong.

In sum, then, the acts described above did not violate the Hobbs Act because those acts, unlike Petitioners', did not involve the wrongful use of force, threats, and violence to obtain property. For these reasons, the Court should reject Petitioners' attempt to masquerade as champions of civil rights and uphold the decision of the lower court.

II. THE FIRST AMENDMENT DOES NOT PROTECT PETITIONERS' PATTERN OF FORCE, VIOLENCE, AND THREATS

Petitioner OR argues that its members' "extensive free speech activity" is "at issue" and that the Court of Appeals' decision threatens their First Amendment rights. Brief of Petitioner Operation Rescue, at 2, 46. That argument misses the point and misstates the issue in this case. As

[11] The SGN *Amici* wrongfully suggest that Petitioners did not violate the Hobbs Act by comparing them to Carrie Nation and the Women's Christian Temperance Union ("WCTU"). Brief of SGN *Amici*, at 23. That argument is a red herring, as it is based on the assumption that the conduct of the WCTU would not have violated the Hobbs Act. In fact, the acts of WCTU, if they satisfied all of the other elements, might have been found to violate the Hobbs Act.

shown above, Petitioners were held liable for engaging in forcible, threatening, violent acts in violation of various criminal statutes and RICO, *not* for protected speech or expressive conduct. In fact, the injunction imposed by the lower court was narrowly tailored to restrict only criminal conduct and to avoid infringing upon mere expression of a point of view. *NOW*, 267 F.3d at 706. As the Court of Appeals recognized, the injunction "has struck the proper balance and has avoided any risk of curtailing protected activities" because it "prohibits only illegal conduct – trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts." *Id.* Moreover, the injunction specifically "underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, [or] handing out literature." *Id.* On that basis, the Court of Appeals rejected Petitioners' "alarmist prediction" that a peaceful picketer who took two accidental steps onto private property would be deemed to have violated the injunction. *Id.* The First Amendment, then, was honored in every respect.

Respondents have not questioned that Petitioners and others have a First Amendment right to voice their opinions about abortion consistent with a number of this Court's rulings. In fact, while Respondents disagree with the views espoused by members of organizations like the National Right to Life Committee, Respondents have not challenged their right to express those views through lawful means such as picketing and leafleting. In this case, Respondents did not challenge even Petitioners' ugliest speech, such as calling patients, staff, and volunteers "murderers," "baby killers," and "sluts," because Respondents

recognize that the First Amendment protects even unpleasant speech. (TT 1032, 1445, 1519).

However, that speech is not what is at issue here. Petitioners have not merely participated in peaceful demonstrations or expressed their political views; instead, they have used their enterprise to hold America's reproductive health clinics under siege, wrongfully employing force, intimidation, threats, and violence to deprive Respondents of their property.[12] The First Amendment offers them no protection for such conduct. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (violent conduct and physical assaults not protected) (citations omitted); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994) (threats not protected); *see also NOW*, 267 F.3d at 701-02 (discussing U.S. Supreme Court precedent holding that violent conduct, threats, and language used to carry out illegal threats are not protected by the First Amendment).

This Court's decision in *Claiborne Hardware*, which guided every aspect of the trial, *cf. NOW*, 267 F.3d at 703, does not compel a different conclusion. *Claiborne Hardware* involved isolated acts of violence as to which there was no evidence that the NAACP authorized or ratified. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 923-24 (1982). With respect to defendant Charles Evers, the Court made clear that Evers could have been found liable had the facts shown that he had "authorized, directed, or

[12] As noted above, Petitioners have left no doubt that they eschewed protected means of influencing the public and the government regarding abortion, choosing instead to use force, threats, and violence to pursue their agenda. (Px 709 ("You can try for 50 years to do it the nice, polite way, or you can do it next week the nasty way")).

ratified specific tortious activity." *Id.* at 927. He was absolved of responsibility because of a lack of evidence, not because the First Amendment immunized force or violence. *Id.* at 927-29. In addition, the Court cited with approval its decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), which held that an injunction was proper in the context of pervasive violent conduct much like the conduct at issue here. *Claiborne Hardware*, 458 U.S. at 923. Again, the First Amendment was not a sanctuary for violence.

Another way to consider the distinction between protected speech and Petitioner's conduct is by analogy to the Second Amendment. Some people interpret the Second Amendment as giving citizens the right to own guns. Even assuming *arguendo* that it does, when someone uses a gun to commit murder, the Second Amendment affords no protection from criminal and civil consequences. Similarly, the First Amendment unquestionably gave Petitioners the right to express their opposition to abortion by speaking out against it, marching in protest, carrying picket signs, and leafleting; however, when Petitioners chose to pick up their picket signs and hit people over the head with them, *see supra* p. 15 (citing *NOW*, 1999 WL 571010, at *2), they lost the protection of the First Amendment for that violent conduct and subjected themselves to liability under RICO and the Hobbs Act.

In short, no one is trying to silence Petitioners;[13] rather, Respondents seek court orders requiring Petitioners to put

[13] For that same reason, the SGN *Amici* need not fear that their freedom of expression is in jeopardy, *see* Brief of SGN *Amici*, at 24, for Respondents recognize that the voices of our nation's activists are the very instruments the First Amendment was intended to protect.

(Continued on following page)

down their weapons and stop using force, violence, and threats against Respondents and others. Affirming the decision below would achieve that result.

CONCLUSION

Petitioners could have chosen any number of ways of making their opposition to abortion known. Instead of leafleting, picketing, or speaking out, they chose to become the "pro-life Mafia," wrongfully using force, violence, and threats to inflict harm upon, threaten, and induce fear in clinic staff and patients. When they made that choice, they violated the Hobbs Act. This Court should affirm the lower court's ruling.

Respectfully submitted,

ELIZABETH A. CAVENDISH
SARA N. LOVE
THE NARAL FOUNDATION®/NARAL®
1156 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 973-3000

AMY E. WEISSMAN
PRESTON GATES & ELLIS LLP
701 Fifth Avenue
Suite 5000
Seattle, WA 98104
(206) 623-7580

September 13, 2002

Presumably the SGN *Amici* in fact engage in the type of "non-violent direct action" they describe in their brief (and not the type engaged in by Petitioners), but do not make threats, commit assaults, destroy property, or otherwise engage in acts of extortion. If that presumption is correct, then they have nothing to fear, because the injunctive relief ordered by the court below is carefully tailored to enjoin only crimes, not protected speech.

APPENDIX

DESCRIPTIONS OF THE *AMICI*
(in alphabetical order)

For well over a century, the *American Association of University Women* ("AAUW"), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education; reproductive choice; social security; and civil rights issues. AAUW promotes the social, economic, and physical well-being of all persons, including freedom from violence. AAUW believes that in order for women to advance in the workplace, education, and all aspects of their lives, women must be free to make their own reproductive health choices. Therefore, AAUW supports the right of every woman to safe, accessible, and comprehensive reproductive health care, including safe access to family planning and abortion clinics nationwide.

The *Asian American Legal Defense and Education Fund* ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history supported public demonstrations and civil disobedience in furtherance of its civil rights agenda. It has provided advice and legal representation to protesters in a number of settings. The violent acts of the appellants in the instant case fall well beyond the civil rights activities supported by AALDEF.

The *Center for Disability and Elder Law* ("CDEL") is a not-for-profit legal aid organization that serves the legal interests of persons over the age of sixty and those with disabilities living in Chicago. Because women generally live longer than men, the majority of our clients are women. CDEL's mission is to provide appropriate resolution of civil legal needs and inquiries of our clients through the use of staff and volunteer attorneys. Services are provided in a manner that sensitively recognizes and accommodates the needs of each person's disability and age. Through the use of a vast network of pro bono attorneys, CDEL works to advance the rights of our clients through advocacy, litigation, outreach, and education. Since its inception in 1984, CDEL has assisted countless women in protecting their legal rights, thereby improving their quality of life.

Chicago Foundation for Women is a public grantmaking organization which funds Chicago metropolitan area organizations and projects that address the needs of women and girls of all economic, ethnic and racial backgrounds. The Foundation works to remove obstacles that prevent women and girls from achieving their full potential in all aspects of their lives, with a focus on promoting access to a complete range of reproductive and other health information and care; economic self-sufficiency; and freedom from violence. Chicago Foundation for Women envisions a society in which women's and girls' voices and abilities are fully protected and realized.

The *Human Rights Campaign* ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 450,000 members nationwide. HRC envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open,

honest and safe at home, at work and in the community. HRC believes in the constitutional right to reproductive choice, including abortion. As a political organization with a nationwide grassroots program to encourage people to advocate for equal rights, HRC also has a strong interest in ensuring that Americans can fully exercise their First Amendment freedom of expression.

The *National Abortion and Reproductive Rights Action League Foundation®/National Abortion and Reproductive Rights Action League®* (collectively "NARAL"), with 27 state affiliates and hundreds of thousands of members and supporters nationwide, is dedicated to keeping abortion safe, legal, and accessible for all women. NARAL's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy. NARAL recognizes that the nationwide campaign of anti-choice violence threatens women's right to choose abortion by exacting a physical and emotional price from patients who seek access to medical services, and by exacerbating the shortage of providers of abortion.

National Center for Lesbian Rights ("NCLR") is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, free legal advice and counseling, and public education. In addition, NCLR provides representation and resources to gay men, and bisexual and transgender individuals on key issues that also significantly advance lesbian rights. NCLR has a strong commitment to freedom of expression and association as well as to reproductive autonomy for all women.

Established in 1935, the *National Council of Negro Women, Inc.* ("NCNW") is the nation's broadest based organization of African American women, with an outreach to four million. NCNW represents 38 national women's organizations, 252 chartered community-based sections in 42 states, 42 college-based sections and thousands of individual members. NCNW's mission is to advance opportunities and improve the quality of life for African American women, their families and their communities. This mission is fulfilled through advocacy and community-based programs in the United States and Africa.

The *National Gay and Lesbian Task Force* ("NGLTF") has worked to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgender people at the local, state and national level since its inception in 1973. As part of a broader social justice movement for freedom, justice and equality, NGLTF is creating a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society.

The *National Partnership for Women & Families* ("National Partnership"), founded as the Women's Legal Defense Fund in 1971, is a non-partisan, non-profit advocacy group that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of women and family. The National Partnership firmly believes that quality health care must include access to the full range of women's reproductive health services. As a result, the National Partnership has a long history of promoting and defending a woman's right to choose by filing *amicus curiae* briefs in major reproductive rights and health cases.

The *National Women's Law Center* is a Washington-based legal organization that has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion, which can only be assured if there is access to healthcare providers.

The *Northwest Women's Law Center* ("Law Center"), based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy and the provision of legal information and referral services. Since its founding in 1978, the Law Center has been dedicated to representing the interests and rights of women seeking abortions. The Law Center has a long history of litigation and participation as *amicus curiae* in cases throughout the Northwest and the country on behalf of women seeking safe and legal abortions. The Law Center has also been instrumental in the passage of legislation that provides safe access to abortion services.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to combat sex-based discrimination and to secure equal rights. A major goal of NOW Legal Defense's work is to secure reproductive rights for all women. To this end,

NOW Legal Defense has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services, including *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) and *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). NOW Legal Defense has also intervened on behalf of doctors, women and clinics to defend the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, against constitutional challenges in several cases.

People For the American Way Foundation ("People For") is a national, non-partisan, education-oriented citizens organization established to promote fundamental constitutional rights and civil liberties. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has over 500,000 members and supporters across the country. People For has filed *amicus* briefs before the United States Supreme Court in cases raising important questions relating to the First Amendment and access to reproductive rights. We join in this *amicus* brief because of the importance of protecting women and their doctors in the exercise of their rights against violence and threats of violence and of distinguishing such conduct from fully protected First Amendment freedom of speech.

The *Rainbow PUSH Coalition, Inc.* ("RPC") is a non-profit organization with over 300,000 members representing virtually every state in the Union and many foreign nations. Its mission is to promote peace, justice and equality. Founded by Rev. Jesse L. Jackson, Sr., RPC actively promotes informed voter participation through registration and information campaigns. RPC attempts to bring about shared economic security for minorities, women and other traditionally under-represented constituencies by encouraging

diversity and inclusion in America's markets and work places. RPC fights for fairness and equality in every sphere of life, while it fights in the tradition of Martin Luther King, Jr. to end violence at home and abroad. A central principal of civil obedience as practiced by Gandhi and Martin Luther King, Jr. is that unearned suffering is redemptive. In other words, it is only when protests are non-violent that they have the moral authority to produce lasting social change. We therefore oppose any attempt to liken violent anti-abortion protests to classical civil rights movements of the 20th century.

Founded in 1971, the *Southern Poverty Law Center* ("The Center") is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before this Court, including a case last Term, *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

Women Employed is a national membership association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that it is every individual's fundamental right to obtain healthcare, and any restriction or impediment to this right should be unlawful. Likewise, employees engaged in the administration of healthcare

should be guaranteed the right to perform their work free from any form of harassment.

The *Women's Law Project* ("Law Project") is a non-profit feminist legal advocacy organization based in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the Law Project is committed to the elimination of sex discrimination and believes that reproductive freedom is an essential component of women's equality. Since our founding, we have frequently represented medical professionals and patients seeking to provide or receive abortion services, often in the face of organized and concerted anti-abortion violence. Our clients have been subjected to arson, death threats, massive and repeated clinic blockades, vandalism of medical equipment and patient records, chemical attacks, assaults, bomb scares, anthrax hoax letters, and frequent harassment and stalking of doctors, patients, and staff.

(28) (24)

Nos. 01-1118, 01-1119

IN THE

SEP 16 2002

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents,

OPERATION RESCUE, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS HENDERSON
NANCY ANDERSON
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, D.C. 20005
202-662-8600

JOSEPH R. BANKOFF*
WILLIAM E. HOFFMANN, JR.
CHRISTOPHER J. SPRIGMAN
EMILY J. CULPEPPER
DAVID M. VISCOMI
JAMIE N. SHIPP
KING & SPALDING
1730 Pennsylvania Avenue NW
Washington, D.C. 20006-4706
202-737-0500

**Counsel of Record*

Counsel for the Lawyers' Committee For Civil Rights Under Law

TABLE OF CONTENTS

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT OF APPEALS' CONSTRUCTION OF THE HOBBS ACT IS CONSISTENT WITH FREEDOM OF EXPRESSION BY GROUPS AND INDIVIDUALS ENGAGED IN SOCIAL PROTEST. 5

A. The First Amendment Affords Broad Protection To Groups And Individuals Engaged In Social Protest But Stops Short Of Protecting Violence And Threats Thereof Of The Type Proved Here. 6

B. The Court Of Appeals Correctly Construed The Hobbs Act To Proscribe The Violent, Extortionate Conduct At Issue 10

II. THE COURT OF APPEALS' HOLDING THAT RICO PROVIDES EQUITABLE REMEDIES FOR PRIVATE PLAINTIFFS IS CORRECT 13

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Califano v. Yamasaki,
442 U.S. 682 (1979) 14

Carpenter v. United States,
484 U.S. 19 (1987) 11

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 8

Edwards v. South Carolina,
372 U.S. 229 (1963) 7

Griffin v. Breckenridge,
403 U.S. 88 (1971) 13

Healy v. James,
408 U.S. 169 (1972) 9

Martin v. City of Struthers, Ohio,
319 U.S. 141 (1943) 7

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) ..... *passim*

National Org. for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 6

National Org. for Women, Inc. v. Scheidler,
267 F.3d 687 (7th Cir. 2001) ..... *passim*

National Org. for Women, Inc. v. Scheidler,
No. 86 C 7888, 1999 WL 571010
(N.D. Ill. July 28, 1999) 5

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 6

Northeast Women's Ctr., Inc. v. McMonagle,
868 F.2d 1342 (3d Cir. 1989) 4, 11

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 14, 16

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 8

Religious Tech. Ctr. v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986) 15, 17

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 8

Samuels v. Mackell,
401 U.S. 66 (1971) 7

Schenck v. United States,
249 U.S. 47 (1919) 8

Scripps-Howard Radio, Inc. v. FCC,
316 U.S. 4 (1942) 14

Thornhill v. Alabama,
310 U.S. 88 (1940) 7

Town of West Hartford v. Operation Rescue,
915 F.2d 92 (2d Cir. 1990) 12

United States v. Anderson,
716 F.2d 446 (7th Cir. 1983) 11

United States v. Arena,
180 F.3d 380 (2d Cir. 1999) 4, 11, 12

United States v. Cappetto,
502 F.2d 1351 (7th Cir. 1974) 16

United States v. Hoelker,
765 F.2d 1422 (9th Cir. 1985) 11

United States v. Santoni,
585 F.2d 667 (4th Cir. 1978) 11

United States v. Turkette,
452 U.S. 576 (1981) 18

United States v. Zemek,
634 F.2d 1159 (9th Cir. 1980) 11

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 7

FEDERAL STATUTES

18 U.S.C. § 1951 ..... 5, 10

18 U.S.C. §§ 1961-68 5

18 U.S.C. § 1964 ..... *passim*

42 U.S.C. § 1985(3) 13

MISCELLANEOUS

G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 558-59 (1987) 18

H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 15

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") respectfully submits this brief as *amicus curiae* in support of the Respondents pursuant to Supreme Court Rule 37.3(a) upon the consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee is a non-profit, non-partisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

Since its inception almost 40 years ago, the Lawyers' Committee has served to secure and protect the civil rights of all citizens, particularly racial minorities who have historically been denied those rights. Those rights, in large measure, have been obtained by groups and individuals engaging in peaceful protests, demonstrations, sit-ins, boycotts, and other forms of constitutionally protected non-violent advocacy and expression. The Lawyers' Committee has sought to protect this process of peaceful change under the law which, at times, has been jeopardized by organized violence and threats of violence. The Lawyers' Committee represented the NAACP in a significant case before this Court, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which the Court upheld the constitutionality of non-violent activities of African-Americans organizing or

[1] This brief was authored by counsel for the *amicus curiae*. No person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

participating in a boycott against local white businesses to protest policies of racial discrimination.

The Lawyers' Committee has and takes no position in the highly charged debate over abortion rights out of which the facts in this case arise. The interest of the Lawyers' Committee is narrowly focused upon the proper application of RICO and the Hobbs Acts to ensure the balance is maintained between protecting the freedoms of expression central for the advancement of the civil rights of citizens while prohibiting violent conduct that prevents citizens from exercising their rights. The Lawyers' Committee embraces the right of all groups to express their views and to attempt to persuade others to adopt those views. Freedom of expression through peaceful protest activities should not be stifled by the prospect of injunction, punishment or damages under RICO or the Hobbs Act. At the same time, the Lawyers' Committee believes that civil rights and free expression are enhanced, rather than chilled, by the imposition of liability under RICO and the Hobbs Act against those who would use force, violence, and threats of violence, rather than legitimate means of persuasion, to prevent others from engaging in lawful and protected conduct.

The interest of the Lawyers' Committee is therefore to preserve the long-recognized legal distinction between peaceful advocacy and violent intimidation. The Lawyers' Committee believes that the court of appeals below correctly construed RICO and the Hobbs Act to maintain that balance on the facts here presented and therefore urges affirmance of the decision below.

SUMMARY OF ARGUMENT

This case neither requires nor invites any new law regarding the balance of freedom of expression and protection against violence and threats of violent conduct. Contrary to arguments raised by Petitioners, this case does not threaten to undermine legitimate forms of social protest or to blur the line this Court has drawn between protected forms of expression and unprotected violent conduct and threats. This Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), ensures that those engaged in social protest will not face liability under RICO, the Hobbs Act, or any other state or federal law for the consequences of constitutionally protected forms of expression.

The protections articulated in *Claiborne Hardware* simply do not, and should not, extend to shelter the conduct at issue here. This record establishes that these Petitioners used repeated acts of violence and threats of violence to impose their views on Respondents and others. Such conduct is not protected expression. The individual defendants in this case were not held accountable simply because of their association with the Pro-Life Action Network ("PLAN"). Rather, they were held accountable because, as high level leaders of PLAN, their publications urging violent conduct were imputable to the organization. Furthermore, they knew of, and actively intended to further, PLAN's violent aims. Whatever constitutional limits might apply to the Hobbs Act, the record here shows that the acts and threats of violence directed against Respondents are plainly unprotected and properly punished as violations of the law.

The court of appeals' construction of the Hobbs Act's proscription against "extortion" was well-grounded in precedent and principles of statutory construction. Like

appeals courts in other circuits, the Seventh Circuit correctly found that intangible rights, including a clinic's right to conduct business, or a patient's right to seek medical services, are protected "property" within the meaning of the Hobbs Act. Petitioners also attempted to "obtain" Respondents' property by forcing or attempting to force Respondents to relinquish their rights though violence or threats of violence. *See, e.g.*, *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989). The court of appeals' construction of the Hobbs Act afforded the necessary protection of Respondents' constitutionally protected rights without abridging, or threatening to abridge in the future, the constitutionally protected right of Petitioners or others to freedom of expression.

Policy considerations also weigh heavily in favor of the application of the Hobbs Act and RICO in this case. Women in certain circumstances and other distinct minorities subject to discrimination are not protected under the Civil Rights Act, and thus are unable to obtain adequate relief under that statute. RICO and the Hobbs Act constitute vital means of guarding the rights of groups lacking other adequate protection under federal law.

The court of appeals' holding that injunctive relief is available in RICO suits by private plaintiffs also should be affirmed. This result is supported by the plain text of the statute and the well-established rule that federal courts retain their inherent equitable authority absent a clear expression of congressional intent to the contrary. Petitioners and the United States as *amicus curiae* argue that a bar against private plaintiffs obtaining injunctive relief should be inferred from the express grant of authority to the Attorney General to seek preliminary injunctive relief. This interpretation, however, is contrary to the terms of RICO's civil remedies provision read as a whole. That provision

expressly confers jurisdiction upon district courts to "restrain violations" and nowhere limits the type of relief available to private plaintiffs. Petitioners' and the United States' proposed construction of the civil remedies provision under RICO would deprive private plaintiffs of the flexible federal remedy intended by Congress.

ARGUMENT

I. THE COURT OF APPEALS' CONSTRUCTION OF THE HOBBS ACT IS CONSISTENT WITH FREEDOM OF EXPRESSION BY GROUPS AND INDIVIDUALS ENGAGED IN SOCIAL PROTEST.

The record here is replete with evidence of incidents in which protestors resorted to violence or threats of violence against person or property to achieve their goals. *See National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 694-95 (7th Cir. 2001); *National Org. for Women, Inc. v. Scheidler*, No. 86 C 7888, 1999 WL 571010, at *1-4 (N.D. Ill. July 28, 1999) (describing illustrative events). The court of appeals properly concluded, as a matter of statutory construction and consistent with this Court's First Amendment jurisprudence, that the conduct proved at trial constituted predicate acts of extortion under the Hobbs Act, 18 U.S.C. § 1951, sufficient to render Petitioners liable for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO").

A. The First Amendment Affords Broad Protection To Groups And Individuals Engaged In Social Protest But Stops Short Of Protecting Violence And Threats Thereof Of The Type Proved Here.

Under the guise of concern with preserving freedom of expression for groups and individuals engaged in social protest, Petitioners urge the Court to adopt a restrictive definition of "extortion" under the Hobbs Act that would shelter any form of protest, no matter how extreme or violent. Petitioners' position ignores the protection afforded to a vast range of non-violent protest activities under this Court's First Amendment jurisprudence. *See National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (noting that "legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise...Conduct alleged to amount to Hobbs Act extortion, for example...may turn out to be fully protected First Amendment activity entitling the defendant to dismissal on that basis") (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). The First Amendment simply does not extend to protect the violent conduct that was established in this case.

Freedom of speech under the First Amendment to the United States Constitution is one of the basic tenets upon which our nation was founded and represents the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the words of this Court, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Claiborne Hardware Co.*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Among the public issues subject to this robust debate, none

is more important than the debate over the contours of our civil rights, including reproductive rights.

Free speech rights guaranteed under the Constitution may be exercised most efficaciously when individuals of like opinions band together. Thus, in *Claiborne Hardware*, the Court stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

458 U.S. at 908 (internal quotation marks and citation omitted). The Court has protected a broad range of activities associated with social protest, including picketing and peaceful marches and demonstrations. *Id.* at 909; *see, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963) (peaceful march and demonstration); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 145-49 (1943) (pamphleteering at individuals' homes); *Thornhill v. Alabama*, 310 U.S. 88, 98-99 (1940) (peaceful picketing). The Court also has protected even speech and conduct meant to coerce "through social pressure and the 'threat' of social ostracism," and has recognized that speech on highly charged issues often may become "vituperative, abusive, and inexact." *Claiborne Hardware*, 458 U.S. at 911 n. 46 (citations omitted).

Nonetheless, "'...violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *Id.* at 916 (citing *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A]

physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"). Threats of violence are akin to "fighting words," or speech which threatens clear and immediate danger of violent injury, and are not entitled to First Amendment protection. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding no protection for "fighting words" that provoke or incite immediate violence); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (finding no protection for speech that creates an immediate panic) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"). "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey." *R.A.V. v. City of St. Paul, Minn.* 505 U.S. 377, 393 (1992).

It is true that individuals or groups engaged in constitutionally protected forms of social protest occasionally may cross the line between protected expression and unprotected, unlawful conduct. This Court's precedent ensures that First Amendment protections are not automatically forfeited as a result by demanding "precision of regulation" of violence or threats of violence occurring in the context of constitutionally protected activity. *Claiborne Hardware*, 458 U.S. at 916 (citation omitted). More specifically, the First Amendment "imposes restraints on the grounds that may give rise to damages liability and on the

persons who may be held accountable for those damages." *Id.* at 916-17.

Liability only may be imposed for damages "proximately caused by unlawful conduct." *Id.* at 918. As this Court stated clearly in *Claiborne Hardware*, courts must strictly guard against imposing liability for the consequences of non-violent, protected activity, while protecting society from violence and threats thereof. *Id.* By protecting citizens against violent conduct, courts neither restrict nor inhibit free speech or civil protest, which were and remain essential tools in the continuing struggle for civil rights. The sit-ins, boycotts, and other non-violent activities of the 1960s would not be held in violation of RICO or the Hobbs Act, but would be entitled to constitutional protection under *Claiborne Hardware* and other Supreme Court cases.

The First Amendment also prohibits imposition of liability on an individual solely because of his or her association with a group that espouses both legal and illegal aims. *See id.* at 918-19. To hold another liable for association with a group, a plaintiff must establish the defendant's "'...knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.'" *Id.* at 920 (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

The court of appeals' construction of the Hobbs Act does not blur the line between protected and unprotected speech and conduct. Nor does it chill the rights of those advocating social causes. The strict criteria articulated in *Claiborne Hardware* were satisfied in this case. Therefore, First Amendment protection was unavailable. Although it is possible that in certain cases RICO or the Hobbs Act might yield to the protection afforded under the First Amendment, this is not such a case.

The record established the pervasive resort to violence and threats of violence by Petitioners and those acting in concert with them. Imposition of liability for the resulting damages was warranted. This case does not involve the unconstitutional imposition of liability based on the mere fact of association. The evidence in the record supports the findings that (1) PLAN itself possessed unlawful goals, as evidenced by newsletters and other publications by the individual defendants, who were high level leaders of PLAN, (2) the individuals defendants, who personally organized and participated in illegal activities, were aware of PLAN's unlawful objectives, and (3) the individual defendants actively intended to further PLAN's illegal goals. *See Scheidler*, 267 F.3d at 703 (7th Cir. 2001) (citing *Claiborne Hardware*, 458 U.S. at 920).

The court of appeals' construction of the Hobbs Act as proscribing the pervasive violent conduct and threats of violence established in the record was consistent with well-established First Amendment principles, poses no threat to free speech rights, and should be affirmed.

B. The Court Of Appeals Correctly Construed The Hobbs Act To Proscribe The Violent, Extortionate Conduct At Issue.

The conduct most likely to lie *within* the scope of the Hobbs Act's proscription against extortion almost always will fall *outside* the bounds of the First Amendment. The Hobbs Act defines extortion as, "the obtaining of property from another, with his consent, induced by wrongful use of *actual or threatened force, violence, or fear* or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). Imposition of RICO liability based on predicate acts of extortion under the Hobbs Act was warranted in this case

because of Petitioners' unlawful use of "actual or threatened" force or violence.

The court of appeals also correctly concluded that the other required elements of predicate extortion were satisfied. Respondents contended that the property taken from them comprised "the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses." *Scheidler*, 267 F.3d at 709. The court of appeals, consistent with its own precedent and that in other circuits, concluded that "intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act." *Id.* (citing *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983) (right of doctor to continue to perform abortions constituted "property" under Hobbs Act)); *see also United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (property element satisfied where evidence demonstrated that anti-abortion activists implicated in attacks on abortion clinics "attempted and conspired to cause those facilities to give up those rights [to continue to perform abortions]"); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (right of women's center that provided abortions to continue to operate its business constituted "property" under the Hobbs Act).[2]

---

[2] *See also United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) (property right involved was right to make business decisions free from threats and coercion); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) ("The right to make business decisions and to solicit business free from wrongful coercion is a protected property right") (citing *United States v. Santoni*, 585 F.2d 667, 672-73 (4th Cir. 1978) (other citations omitted)); *cf. Carpenter v. United States*, 484 U.S. 19, 26 (1987) (newspaper's interest in keeping confidential and making exclusive use, prior to publication, of contents of column, was "property" within the meaning of federal wire and mail fraud statutes).

The "obtaining" element of predicate extortion under the Hobbs Act was established here as well. Consistent with other courts addressing the issue under similar circumstances, the court of appeals held that "an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Scheidler*, 267 F.3d at 709 (citing *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995) (internal quotation marks omitted); *see also Arena*, 180 F.3d at 394 (dictionary definition of "obtain" includes "attain[ing]...disposal of"; thus, "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm, in order to induce abandonment of that right has obtained, or attempted to obtain property"); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) (Hobbs Act imposes "no requirement that the perpetrator of an extortion receive the benefit of his act").

RICO and the Hobbs Act are important, even vital tools to protect the public from pervasive violent conduct. Petitioners' professed concern that potential RICO or Hobbs Act liability will chill free speech rights is illusory. The conduct shown in this record is prohibited by the Hobbs Act and lacks social value or any entitlement to First Amendment protection. Instead, depriving the government and private litigants of the ability to utilize RICO and the Hobbs Act when other remedies prove inadequate will lead to grave consequences for public safety.

For instance, in *United States v. Arena*, the federal government brought RICO charges, predicated on Hobbs Act extortion, against activists who conspired in butyric acid attacks on two facilities providing abortion services and who intended to carry out more attacks. 180 F.3d at 388-89. The hazardous substance used in the attacks could, and did, cause

health problems and extensive property damage. *Id.* at 385. The federal charges in *Arena* were brought because state criminal proceedings resulted in lenient sentences (five years of probation) "inadequate to vindicate the federal interest in protecting the rights of citizens to obtain reproductive health services free from threats of force and violence." *Id.* at 389. Petitioners here ask the Court to foreclose recourse to a much-needed federal remedy in cases like *Arena* based on their contention, *inter alia*, that protestors who unlawfully damage or destroy property and inflict physical harm on individuals do not "obtain" property within the meaning of the Hobbs Act. *See* Brief for Petitioner (No. 01-1119), at pp. 29-39.

RICO and the Hobbs Act are also particularly important tools for private litigants who may belong to a group not protected by the Civil Rights Act, 42 U.S.C. § 1985(3), which requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). For such groups, RICO and the Hobbs Act often may provide the only adequate remedy available to shelter them from repeated, pervasive violence masquerading as social protest.

II. THE COURT OF APPEALS' HOLDING THAT RICO PROVIDES EQUITABLE REMEDIES FOR PRIVATE PLAINTIFFS IS CORRECT.

As the court of appeals correctly stated, interpretation of the remedial provisions of the RICO statute "begins with the statute's text, and, if the text is unambiguous, [ ] ends there as well." *Scheidler*, 267 F.3d at 695 (citing *Alexander v. Sandoval*, 121 S. Ct. 1511, 1520-21 & n.7 (2001)).

The court of appeals was asked to decide whether Congress in enacting RICO withheld from the federal courts

their customary power to provide equitable relief. The court of appeals' conclusion that the statute plainly provides for private injunctive relief is correct. But even if the text is less clear than it appeared to the court of appeals, Petitioners cannot prevail unless Congress clearly excluded equitable relief. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."). *Accord, Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 17 (1942) ("Congress would not, without clearly expressing such a purpose, deprive . . . [a court] of its customary power . . . . Denial of such power is not to be inferred . . . [from] silence . . . Where Congress wished to deprive the courts of . . . historic power, it knew how to use apt words.").

Close examination of the text of RICO's civil remedies provision, 18 U.S.C. § 1964, yields no evidence that Congress intended to withdraw equitable jurisdiction.

Section 1964 provides, in pertinent part, that:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders . . . .
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper.

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

Subsection (a) broadly empowers the federal courts to grant injunctive relief to "restrain violations" in actions brought under the RICO statute. This broad authority is not limited by the subsection's text or by legislative history to a governmental claim for relief. *See, e.g.*, H.R. REP. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 ("Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.").

Subsection (b) authorizes the Attorney General to institute proceedings "under this section" (*i.e.*, under section 1964), and specifically empowers the government to seek interim injunctive relief. Petitioners, and the United States in its brief *amicus curiae*, suggest that by granting the government authority under subsection (b) to bring actions "under this section," "Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General." Brief for the United States as *Amicus Curiae* ("U.S. Br."), at p. 6. This argument, which is based on the Ninth Circuit's opinion in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), is untenable for at least three reasons.

First, this argument ignores private plaintiffs' right to sue under Section 1964. Subsection (c) authorizes suits by private parties and provides for recovery by a successful plaintiff of treble damages, costs, and attorney's fees.

The language of subsection (c) does not bar private plaintiffs from access to the equitable powers accorded the federal courts in subsection (a), either expressly or by a "necessary and inescapable inference." *Porter*, 328 U.S. at 398. Had Congress intended to preclude such relief to private plaintiffs, it easily could have done so. For instance, instead of providing in subsection (c) that any person injured "may sue . . . *and* shall recover threefold the damages . . .," Congress could have provided that a plaintiff "may sue . . . *to* recover threefold the damages . . . ." By changing a single word, Congress would have made clear that private plaintiffs were limited to damages, costs and fees. To the contrary, the actual language establishes that those remedies are accorded to private plaintiffs *in addition to* the general equitable relief provided for in subsection (a).

Second, Petitioners and the United States overlook the real purpose of the language in subsection (b) empowering the government to file suit "under this section." As the Seventh Circuit found in *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), the inclusion of specific authorization for government equity suits in section 1964 was intended to eliminate dispute about the scope of the Attorney General's authority to seek equitable relief. Under traditional rules of equity, the government's request for an injunction was subject to the requirement that it establish irreparable injury or inadequacy of remedy at law. Section 1964 removed these requirements:

> It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than the injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of remedy at law.

Id. at 1358-59.

Third, Petitioners' construction creates absurd results. If authorization for injunctive relief is limited to subsection (b)'s express allowance of the Attorney General to seek *preliminary* injunctive relief, then no one, not even the Attorney General, would be authorized to seek the *permanent* injunctive relief that Congress contemplated in subsection (a).[3] The patent absurdity of such a result -- which would allow federal courts to award damages in racketeering cases but would foreclose them from permanently enjoining racketeering activity -- demonstrates that the court of appeals' construction of the remedial provision is correct.

In the face of the clear language of section 1964, Petitioners and the United States in its brief *amicus curiae* offer a policy argument, asserting that this Court should limit private RICO plaintiffs to monetary remedies lest it "arm private litigants with far-reaching and novel equitable remedies." Brief for Petitioners (No. 01118), at p. 48. *See also* U.S. Br., at pp. 14-15. But this argument misunderstands the consequences of denying private plaintiffs equitable relief under RICO.

Because of the nature of the predicate offenses that must be proven to satisfy RICO's pattern of racketeering requirement, most conduct actionable under RICO also is actionable under state criminal statutes. As a consequence, a federal court exercising pendant jurisdiction over parallel

---

[3] The Ninth Circuit's opinion in *Wollersheim* errs on this point. As the court of appeals noted in *Scheidler*, contrary to the Ninth Circuit's statement that section 1964(b) "explicitly 'permits *the government* to bring actions for equitable relief,'" that section "specifically mentions only *interim* remedies." 267 F.3d at 696-97 (emphasis in original) (quoting *Wollersheim*, 796 F.2d at 1082).

state claims could provide equitable relief to a RICO private plaintiff. That equitable relief, however, would be provided pursuant to a body of state law that Congress has already found to be inadequate to address RICO-type claims. *United States v. Turkette*, 452 U.S. 576, 586 (1981) (Congress enacted RICO because existing "state and federal [law] was not adequate"). Furthermore, the types of equitable relief available under state law vary from state to state. Therefore, a federal court might find that the form of injunctive relief it believes most appropriate in a case is unavailable under applicable state law. In contrast, a federal court granting private equitable relief under RICO is accorded wide discretion under section 1964(a) to shape its relief to meet any situation it might face. *See* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 558-59 (1987).

The court of appeals' holding that the plain language of RICO's remedial provision permits private injunctive relief is correct.

CONCLUSION

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law, as *amicus curiae*, respectfully submits that the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

THOMAS HENDERSON
NANCY ANDERSON
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, D.C. 20005
202-662-8600

JOSEPH R. BANKOFF*
WILLIAM E. HOFFMANN, JR.
CHRISTOPHER J. SPRIGMAN
EMILY J. CULPEPPER
DAVID M. VISCOMI
JAMIE N. SHIPP
KING & SPALDING
1730 Pennsylvania Avenue NW
Washington, D.C. 20006-4706
202-737-0500

**Counsel of Record*

Counsel for the Lawyers' Committee
For Civil Rights Under Law

SEPTEMBER 16, 2002

(29) (25)

Nos. 01-1118, 01-1119

SEP 17 2002

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* MOTOROLA CREDIT CORPORATION IN SUPPORT OF RESPONDENTS

CHARLES G. COLE
Counsel of Record
HOWARD H. STAHL
STEVEN K. DAVIDSON
BRUCE C. BISHOP
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for *Amicus Curiae*
Motorola Credit Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D C 20001

QUESTION PRESENTED

Do federal courts have the power to order injunctive relief in civil actions brought by victims of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. RICO DOES NOT RESTRICT FEDERAL COURTS' INHERENT EQUITABLE POWER TO AWARD INJUNCTIVE RELIEF	5
A. Federal Courts Possess Inherent Equitable Power to Redress Injury Through Injunctions	5
B. By Creating Expansive New Remedies In RICO, Congress Did Not Restrict Courts' Equitable Power	7
C. Congress' Mandate That RICO Be Construed Broadly Confirms That The Statute Does Not Restrict Traditional Remedies	14
D. RICO's Remedies Are Not Narrowed By Restrictive Antitrust Precedent	16
E. RICO's Legislative History Provides No Basis For Inferring Intent to Remove District Courts' Equitable Jurisdiction	19
II. INJUNCTIVE REMEDIES ARE NEEDED BY VICTIMS OF ORGANIZED RACKETEERING ACTIVITY	21
III. RICO DOES NOT REMOVE THE COURT'S POWER TO PRESERVE THE STATUS QUO THROUGH INTERIM RELIEF	25
CONCLUSION	30

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987)	19, 20
Alexander v. Sandoval, 532 U.S. 275 (2001)	13
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932)	16
Beck v. Prupis, 529 U.S. 494 (2000)	8, 10, 22, 24
Bell v. Hood, 327 U.S. 678 (1946)	6
Califano v. Yamasaki, 442 U.S. 682 (1979)	2, 3, 7, 26
California v. American Stores Co., 495 U.S. 271 (1990)	18
Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994)	21
Chevron U.S.A. v. Echazabal, 122 S. Ct. 2045 (2002)	11, 12
D.R. Wilder Mfg. Co. v. Corn Prods. Refining Co., 236 U.S. 165 (1915)	17, 18
Davis v. Passman, 442 U.S. 228 (1979)	6
In re Debs, 158 U.S. 564 (1895)	9
Deckert v. Independence Shares Corp., 311 U.S. 282 (1940)	6, 13, 26, 28
Department of Housing & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002)	20
District of Columbia v. Carter, 409 U.S. 418 (1973)	16
Erlenbaugh v. United States, 409 U.S. 239 (1972)	16
FTC v. Dean Foods Co., 384 U.S. 597 (1966)	26
Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)	*passim*
Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921)	18
General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261 (1922)	18

TABLE OF AUTHORITIES—Continued

Page

Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308 (1999) 5, 10, 26, 27
Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 16, 19
Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 12
Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982) 19
Miller v. French, 530 U.S. 327 (2000) 7, 26
Minnesota v. Northern Secs. Co., 194 U.S. 48 (1904) 17, 18
Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) ..... *passim*
Motorola Credit Corp. v. Uzan, 2002 WL 1963301 (S.D.N.Y. Aug. 22, 2002) 23, 27
National Org. for Women v. Scheidler, 510 U.S. 249 (1994) 22
Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) ... 18
Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) ..... *passim*
Reves v. Ernst & Young, 507 U.S. 170 (1993) 15
Rotella v. Wood, 528 U.S. 549 (2000) 14, 19, 24, 28
Russello v. United States, 464 U.S. 16 (1983) 8, 14, 19
In re Sawyer, 124 U.S. 200 (1888) 9
Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) ..... *passim*
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) ..... *passim*
Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) 21
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 6
Tafflin v. Leavitt, 493 U.S. 455 (1990) 16

TABLE OF AUTHORITIES—Continued

Page

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 7
Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 13, 14
United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) 9
United States v. Cooper Corp., 312 U.S. 600 (1941) 17, 18
United States v. Turkette, 452 U.S. 576 (1981) 8, 15, 22, 24

DOCKETED CASE

Motorola Credit Corp. v. Uzan, No. 02-7566 (2d Cir. argued Aug. 5, 2002) 1

ENGLISH CASE

Ashby v. White, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q.B. 1702) 6

FEDERAL STATUTES

All Writs Act, 28 U.S.C. § 1651 (2000) 25, 26
Clayton Act, ch. 323, § 15, 38 Stat. 736 (Oct. 15, 1914) (current version at 15 U.S.C. § 25 (2000)) 16, 17, 18
Judiciary Act of 1789 § 11, 1 Stat. 78 ..... *passim*
Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452 (1970), *codified at* 18 U.S.C. § 1964 (2000) ..... *passim*
Sherman Act, ch. 647, § 4, 26 Stat. 209 (July 2, 1890) (current version at 15 U.S.C. § 4 (2000)) 16, 17, 18

TABLE OF AUTHORITIES—Continued

FEDERAL RULES OF CIVIL PROCEDURE — Page

Fed. R. Civ. P. 2 17
Fed. R. Civ. P. 18 ..... 11, 18

LEGISLATIVE HISTORY

116 Cong. Rec. 35346-47 (Oct. 7, 1970) 20

TREATISES

22 Am. Jur. 2d *Damages* (1988) 12
Armistead M. Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928) 18
Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) 12
Frederick Pollock & Frederic William Maitland, *The History of English Law* (2d ed. 1923) 12
John Norton Pomeroy, Jr., *Equity Jurisprudence* (4th ed. 1918) 9
Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law & Strategy* (1989) 22
Charles Alan Wright *et al.*, *Federal Practice & Procedure* (2d ed. 1995) ..... *passim*

LAW REVIEW ARTICLES

G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) 9, 15
G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526 (1987) 12
Developments in the Law—Injunctions, 78 Harv. L. Rev. 994 (1965) 9, 24

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

Merriam-Webster's Collegiate Dictionary (10th ed. 1997) 11

INTEREST OF THE AMICUS

Motorola Credit Corporation appears as *amicus curiae* to urge this Court to affirm the court of appeals' ruling that district courts have power to order injunctive relief in civil suits brought by victims of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).[1]

Motorola Credit Corporation (hereinafter, "Motorola") is the financing affiliate of Motorola, Inc., a world leader in the manufacture and servicing of cellular telecommunications systems. Motorola is currently a plaintiff in a civil RICO suit where it has alleged that a family of racketeers and their associates defrauded Motorola of more than $2 billion in loaned funds. The district court preliminarily found the defendants had perpetrated a "massive swindle" through a pattern of racketeering activity that included wire fraud and extortion. *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 242 (S.D.N.Y. 2002). The court further found the fraud was ongoing, and had even been carried into the court itself. *Id.* at 248. The court thus entered a preliminary injunction designed to stop the fraud and protect Motorola from further harm while litigation was pending. *Id.* at 242, 248. That preliminary injunction is currently on appeal. *Motorola Credit Corp. v. Uzan*, No. 02-7566 (2d Cir. argued Aug. 5, 2002).

Motorola thus has a substantial interest in the first issue in this case—the availability of injunctive relief in suits brought under § 1964(c). As a victim of the kind of racketeering activity RICO was designed to combat, Motorola has a strong

[1] All parties have given blanket consent to the filing of *amicus* briefs in this case, in letters filed with the Clerk of this Court on May 8 and 9, 2002. No counsel for any party authored this brief in whole or in part. No person or entity other than Motorola Credit Corporation made a monetary contribution to the preparation or submission of this brief.

interest in seeing that federal district courts have the power to enjoin acts of racketeering. In light of its experience, Motorola has a further interest in assuring that this Court preserves in civil RICO actions the district courts' power to award relief *pendente lite*.

SUMMARY OF ARGUMENT

I. "[T]he right to grant injunctive relief in private civil actions in accordance with traditional principles of equity jurisdiction is one of the equitable powers given to federal courts by the Judiciary Act of 1789." *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243 (S.D.N.Y. 2002). This Court has long made clear it will not find a restriction on such traditional equitable powers absent clear congressional command. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). Where Congress has created a statutory right of action to enforce legal rights, the Court presumes the availability of all appropriate remedies, equitable and legal, unless Congress expressly indicates otherwise. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-66, 70-71 (1992).

In RICO, a statute designed to provide new remedies to combat organized crime, Congress has not restricted any traditional equitable remedies. In § 1964(a), Congress vested federal courts with jurisdiction over civil RICO actions and authorized a variety of equitable remedies to "prevent and restrain" racketeering violations. In § 1964(b), Congress eliminated an impediment to the government's pursuit of equitable relief by removing the common law requirement of a showing of irreparable harm. In 18 U.S.C. § 1964(c), Congress expressly created a right of action for victims of racketeering, providing that "[a]ny person injured . . . by reason of a [RICO] violation . . . may sue therefor." As the district court hearing Motorola's civil RICO case concluded,

> [w]hether or not the language of § 1964 expressly confers this power [to grant injunctive relief] as

> 'unambiguously' as the Seventh Circuit asserts, it nowhere expressly denies courts this power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails.

Motorola, 202 F. Supp. 2d at 244.

Congress' express grant of such remedies as treble damages and attorneys' fees does not constitute an express rejection of pre-existing remedies. Congress had a good reason to mention treble damages and attorneys fees in § 1964(c): as departures from the common law, those remedies are not available unless prescribed by statute. Congress' grant of *additional* statutory remedies does not imply any intent to *subtract* remedies already available.

Petitioners would like to infer from Congress' *silence* regarding pre-existing remedies that it did not intend for them to be available. This Court has repeatedly rejected that view. *See Franklin*, 503 U.S. at 68; *Yamasaki*, 442 U.S. at 705; *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942). The cases cited by petitioners that invoke such reasoning concern whether to imply a private *right of action*. But whether a private right of action exists is "analytically distinct" from the question of what remedies are available under a right of action that is provided by statute. *Franklin*, 503 U.S. at 65-66. Where, as here, the right of action is express, the Court does not ask whether Congress intended to create the remedy at issue. Instead, it presumes all remedies are available, unless Congress has expressly indicated otherwise.

RICO contains no such express indication. In fact, it contains precisely the opposite: an explicit statutory directive that RICO be construed broadly for remedial purposes. This liberal-construction mandate makes it impossible to con-

clude that § 1964(c) eliminated traditional equitable remedies through silence.

Analogies to nearly century-old precedent under the antitrust laws cannot substitute for an express denial of equitable powers. When the antitrust statutes were drafted, law and equity were divided, making it logical that legal and equitable remedies would be separate. When RICO was enacted in 1970, law and equity had long been merged, such that § 1964(c) could provide legal and equitable remedies in the same cause of action. Moreover, by that time, injunctive remedies had long been available in private antitrust suits, and were thus a recognized part of the antitrust remedies Congress sought to apply in RICO. This Court has observed that Congress enacted RICO under the criminal code, rather than the antitrust title, to avoid subjecting racketeering victims to restrictive antitrust precedents. Indeed, RICO's statutory directive to construe its remedial provisions broadly makes it a wholly different statute than the antitrust laws.

Inferences from RICO's legislative history are similarly unavailing. The argument for restricting injunctive relief rests on the withdrawal of an amendment that would have confirmed *several* additional remedies, including injunctive relief for racketeering victims. This Court has warned that such failed legislative enactments are thin support for restrictive statutory interpretation, especially where (as here) there are many possible reasons for the failure to enact, including the possibility that the remedies were already available under the bill.

2. This case concerns the reach of RICO's civil remedies in the context of socially divisive protest activity. But the Court's decision will determine the statute's remedial reach in all contexts, including Congress' core area of concern in enacting RICO: the protection of American businesses against the predations of organized crime. Motorola's experience as a victim of racketeering illustrates the strong

need for injunctive remedies to stop racketeering activity. Limiting civil RICO's relief to damages would severely hamstring victims' ability to protect themselves through civil RICO actions. It would be illogical for Congress to have intended that racketeering victims be able to recover treble damages for their injuries, but be unable to stop ongoing racketeering causing further injury.

3. Motorola's experience also illustrates the strong need for interim, as well as permanent, injunctive relief. Federal courts have always possessed the power to preserve the status quo in cases pending before them, both to prevent irreparable harm and to protect their ability to award meaningful relief. This Court has long recognized this inherent power of federal courts, and has refused to infer restrictions on the power absent express instruction from Congress.

Interim relief is especially necessary in the RICO context, to protect victims from criminals determined to continue their racketeering activity even as litigation proceeds against them. Federal courts surely are not powerless to stop ongoing crimes and frauds by parties in cases before them. Rather, they are vested with the power to prohibit continuing racketeering activity and prevent ongoing harm during the pendency of civil actions under § 1964(c).

ARGUMENT

I. RICO DOES NOT RESTRICT FEDERAL COURTS' INHERENT EQUITABLE POWER TO AWARD INJUNCTIVE RELIEF

A. Federal Courts Possess Inherent Equitable Power to Redress Injury Through Injunctions

Since enactment of the Judiciary Act of 1789, federal courts have had the power to award injunctive relief under their equitable jurisdiction. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318-19 (1999). This

power inheres in the courts' power to remedy invasions of legal rights: "From the earliest years of the Republic, the Court has recognized the power of the Judiciary to redress injuries actionable in federal court . . . ." *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992). The principle is one of English common law: "If a statute gives a right, the common law will give a remedy to maintain that right . . . ." *Ashby v. White*, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q.B. 1702), *quoted in Franklin*, 503 U.S. at 66-67.

Moreover, where Congress has created a statutory right of action to enforce a legal right, the availability of *all* remedies, both legal and equitable, is presumed: "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940) ("[T]he power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies.").

In *Franklin*, this Court surveyed the "deep roots" of this "traditional presumption in favor of all appropriate relief." 503 U.S. at 66, 69. It squarely rejected the argument that this presumption had been abandoned. The Court acknowledged it had "not always distinguish[ed] clearly between a right to bring suit and a remedy available under such a right." *Id.* at 66. It emphasized, however, that

> the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place. *Davis v. Passman*, 442

> U.S. 228, 239 (1979). Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979), we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.

Franklin, 503 U.S. at 65-66.

In applying this traditional presumption, this Court will not lightly infer any restriction of federal courts' equitable authority. *Miller v. French*, 530 U.S. 327, 336 (2000). "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). As this Court concluded in *Franklin*, "[t]he general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71.

B. By Creating Expansive New Remedies In RICO, Congress Did Not Restrict Courts' Equitable Power

In light of the traditional presumption in favor of all appropriate remedies, federal courts are empowered to grant injunctive relief in RICO civil actions unless Congress has clearly directed to the contrary. Congress plainly has not done so. Section 1964(c) authorizes those injured by racketeering activity "to sue therefor." It also gives remedies (treble damages and attorneys fees) that are above and beyond those available at common law. Congress' grant of these *additional* remedies does not indicate any intent—much less an express direction—to *subtract* remedies already available.

The provision of additional remedies was an integral part of the congressional plan. RICO "was intended to provide new weapons of unprecedented scope" against organized crime. *Russello v. United States*, 464 U.S. 16, 26 (1983). Having found then-existing sanctions and remedies "'unnecessarily limited in scope and impact,'" Congress acted to provide "'enhanced sanctions and new remedies.'" *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (quoting Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970)); *accord Russello*, 464 U.S. at 27; *United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

Among the new legal weapons enacted was § 1964, which provided for civil remedies against those engaged in racketeering activity. Section 1964(a) gave the district courts jurisdiction and broad remedial powers. It provided that "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders," § 1964(a), and gave a non-exclusive list of such orders, that tracked the activities prohibited by § 1962 (*e.g.*, ordering individuals to divest their interests in certain enterprises, restricting their future activities and investments in similar endeavors or enterprises, or ordering dissolution or reorganization of enterprises).

On its face, § 1964(a) makes these remedies available to any person with a right to sue under the statute. It contains no restriction as to who may invoke courts' jurisdiction to "prevent and restrain" RICO violations. Nor does it suggest any limitation on the availability of injunctive relief. Its phrase "including but not limited to" indicates intent to make certain types of orders available, without restricting traditional remedies. Thus, "subsection (a) of 1964 made express what was already inherent—that in civil RICO actions, as in other civil actions, the federal district courts have broad equitable powers." *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 239, 244 (S.D.N.Y. 2002). "If anything, subsection (a) extended the courts' equitable jurisdiction in

civil RICO actions beyond what was granted by the Judiciary Act of 1789 . . . ." *Id.*

Section 1964(b) gave the Attorney General authority to "institute proceedings under this section," and authorized the court to grant *pendente lite* relief in such actions brought by the government. This authorization removed any obstacles that might have arisen for the government under traditional equity jurisprudence, which held that equity could be invoked only for the protection of property. *See In re Debs*, 158 U.S. 564, 583, 593 (1895); *In re Sawyer*, 124 U.S. 200, 210 (1888); 1 John Norton Pomeroy, Jr., *Equity Jurisprudence* § 100 (4th ed. 1918). Under the traditional view, absent a property interest, equity would not enjoin a crime. *See Debs*, 158 U.S. at 593; *Sawyer*, 124 U.S. at 210; 5 Pomoroy, *supra*, § 1890; 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2942, at 70-71 (2d ed. 1995) ("Wright & Miller"). Moreover, because the Government was not the "victim" of the racketeering acts, it could have trouble showing irreparable injury or inadequacy of a remedy at law, or the inadequacy of criminal proceedings as a remedy. *See* Wright & Miller § 2942, at 70-71; *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1016 (1965).

Section 1964(b) solved these problems for the government:

> It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of the inadequacy of the remedy at law.

United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974); *see also* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 331 & n.212 (1982).

While § 1964(b) removed impediments for the government, § 1964(c) gave victims of racketeering a right of action against those who injured them, with an added treble damages remedy: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may sue therefor* in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." § 1964(c) (emphasis added). This provision "creates a civil cause of action for '[a]ny person injured in his business or property by reason of a violation of [RICO].'" *Beck*, 529 U.S. at 495.

The Petitioners and the United States argue that only the government has been granted a general right of action, because § 1964(b) reserves to the Attorney General the power to "institute proceedings under this section." But § 1964(c) similarly gives to the victims of racketeering a right "to sue *therefor*"—a right to sue for the injuries arising from a violation. In his *amicus* brief (at 7), the Solicitor General omits "therefor" from his quotation of the statute, and thereby misses the point that this subsection provides a general right to sue.[2]

There is no reason to believe that a victim's right to "sue []for" injury caused by a RICO violation is inherently more limited than the government's right to "institute proceedings." Contrary to suggestion, "proceedings" is not an exclusive word for invoking "equity," nor are "suits" limited only to "damages." *E.g.*, Scheidler Br. at 41 n.30. Rather, "[t]he Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all *suits . . . in equity*.'" *Grupo Mexicano*, 527 U.S. at 318 (quoting Judiciary Act of 1789 § 11, 1 Stat.

---

[2] It is possible "therefor" refers to the "violation," rather than the injury. Either reading leads to the same result: a right of action to redress the injury resulting from the violation.

78) (emphasis added). At least since the merger of law and equity in 1938, a "suit" brought pursuant to a statutory cause of action may invoke both legal and equitable remedies. *See* Fed. R. Civ. P. 18; 4 Wright & Miller § 1043. Unless otherwise expressly limited, § 1964(c)'s authorization for racketeering victims to "sue therefor" creates a statutory action for which all traditional remedies, both legal and equitable, are available.

Congress did not include any such express limitation in §1964(c). Those opposing injunctive relief for racketeering victims argue that the grant of treble damages in this provision *implies* that no other remedies are available. On its face, this theory does not identify an express direction.

Instead, the argument is one of negative implication: "the identification of a damages and fees remedy . . . logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1083 (9th Cir. 1986). This argument is often invoked by the maxim "*expressio unius exclusio alterius*." *E.g.*, Operation Rescue Br. at 9-11; *Chevron U.S.A. v. Echazabal*, 122 S. Ct. 2045, 2049 (2002) ("expressing one item of an associated group or series excludes another left unmentioned") (citation and alteration marks omitted).

Section 1964(c), however, is poor ground for application of the "*expressio unius*" maxim. First, there is no language in § 1964(c) suggesting exclusiveness of the treble damages remedy. *See Echazabal*, 122 S. Ct. at 2050. The language "*and* shall recover threefold the damages" is language of inclusion, not exclusion: it means plaintiffs may recover treble damages *in addition to* whatever other remedies may be available.[3] The language contains no suggestion that other

[3] Operation Rescue argues it is "bizarre" to read "and" as inclusive rather than exclusive. Operation Rescue Br. at 21 & n.23 (quoting a 1983 district court opinion). But it is hardly bizarre that "and" connotes addition, not limitation. *See Merriam-Webster's Collegiate Dictionary* 43 (10th ed. 1997) ("*and* . . . *1*—used as a function word to indicate connection or addition . . ."). remedies are excluded. *See* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 544-46 (1987).

Second, § 1964(c) does not contain any "series of terms from which an omission bespeaks a negative implication." *Echazabal*, 122 S. Ct. at 2050. This Court has cautioned that such a series is an "essential . . . ingredient": without it, there is no ground to apply the *expressio unius* rule. *Id.* Section 1964(c), however, contains no comprehensive list of remedies, from which equitable relief is notably missing. Instead, it contains a general right of action, coupled with a nonexclusive specification of a treble damages remedy in addition to whatever remedies are ordinarily available.

Third, there is an excellent reason why Congress would specify treble damages and attorneys' fees but not other remedies in § 1964(c): those remedies are not available unless prescribed by statute. 22 Am. Jur. 2d *Damages* § 813 (1988); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994); *see* Dan B. Dobbs, *Law of Remedies* § 3.12 (2d ed. 1993) (surveying multiple damages statutes); 2 Frederick Pollock & Frederic William Maitland, *The History of English Law* 522 & n.1, 524 (2d ed. 1923) (double and treble damages were created by statute, apart from damages that could be awarded by the King's justices or by jury verdict).

Congress' prescription of *additional* statutory remedies, while remaining silent about traditional common law remedies, furnishes no ground for inferring that those ordinary legal and equitable remedies were eliminated *sub*

silentio. "[D]enial of such [equitable] power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942). "That a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (quoting *Deckert*, 311 U.S. at 288). For all of these reasons, it is a mistake to read § 1964(c) by negative implication.

The precedents cited by Petitioners in support of the negative implication argument are cases where this Court considered whether to imply a *right of action*. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 14-15 (1979). For example, Petitioners rely heavily on this Court's statement in *Transamerica* that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S. at 19 (1979). But in *Transamerica*, "remedy" referred to the availability of a *private cause of action*. *See id.* at 14-15. As this Court later clarified, whether a *right of action* exists is "analytically distinct" from what *remedies* are available when Congress has already created the right of action. *Franklin*, 503 U.S. at 65-66. Where Congress has created a right of action expressly, this Court does not inquire to determine what remedies were provided. Instead, it "presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.*[4]

It is undisputed that RICO creates a private right of action for victims of racketeering. Thus, those relying on

[4] The Ninth Circuit relied on *Transamerica* in *Wollersheim*, 796 F.2d at 1088. *Wollersheim*, however, pre-dated this Court's *Franklin* decision clarifying the distinction between rights of action and remedies.

Transamerica and its progeny have the presumption exactly reversed. The question is not whether the text and history of RICO reflect intent to create an injunctive remedy. It is whether, having created a right of action to redress injury to private citizens, Congress clearly directed an elimination of that traditional remedy. Congress manifestly did not eliminate any remedy in the language of section 1964. Hence, the traditional presumption in favor of all appropriate remedies prevails.

C. Congress' Mandate That RICO Be Construed Broadly Confirms That The Statute Does Not Restrict Traditional Remedies

Even if the language and structure of § 1964, construed in light of the general presumption recognized in *Franklin*, did not by themselves establish that courts retain their traditional equitable powers, Congress eliminated any doubt by specifically directing that RICO's remedial provisions be construed broadly.

The mandate is contained in the statute itself: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Such a mandate enacted in a statute was unprecedented in federal criminal law. *Russello*, 464 U.S. at 27. This Court has given significant weight to Congress' directive. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) ("RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition . . . .") (citation omitted); *Rotella v. Wood*, 528 U.S. 549, 557 n.3 (2000).

This Court has also recognized that RICO's "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. Although the liberal-construction

mandate may not be dispositive in determining the *substantive* elements of a RICO offense under § 1962, *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993), "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964[(c)], where RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 492 n.10.

Under this liberal construction mandate, one cannot interpret RICO's *addition* of a treble damages remedy as having silently displaced the district courts' traditional equitable powers. As Judge Rakoff explained in his opinion awarding Motorola preliminary injunctive relief in its current RICO action, "it would be extraordinary indeed if Congress, in enacting a statute that Congress expressly specified was to be 'liberally construed to effectuate its remedial purposes,' intended, without expressly so stating, to deprive the district courts of utilizing this classic remedial power in private civil actions brought under the act." *Motorola*, 202 F. Supp. 2d at 244 (citation omitted).

This conclusion is reinforced by the provision that follows the broad construction mandate: "Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." Pub. L. No. 91-452, § 904(b), 84 Stat. 947. Congress thus expressly stated its intent that RICO supplement, not supplant, otherwise existing law. Blakey, *supra*, 58 Notre Dame L. Rev. at 268 n.92; *cf. Turkette*, 452 U.S. at 586 n.9.

Where Congress (i) created a right of action to redress injury, (ii) added *additional* remedies, *and* (iii) expressly directed that the statute be construed liberally for remedial purposes, it is inconceivable that the statute could thereby have silently removed an inherent remedial power courts have possessed since 1789.

D. RICO's Remedies Are Not Narrowed By Restrictive Antitrust Precedent

Petitioners and the United States argue that because the Sherman Act and the Clayton Act were interpreted nearly 100 years ago not to include injunctive relief for private plaintiffs, this Court should give § 1964(c) a similar construction. Again, it is doubtful that this kind of argument by analogy could create the clear command necessary to overcome the traditional presumption in favor of all appropriate remedies.

In any event, this interpretation is wrong. "[T]he mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Tafflin v. Leavitt*, 493 U.S. 455, 462 (1990) (citation omitted) (refusing to apply RICO/Clayton Act analogy).[5] There are a number of reasons why RICO's civil remedy provision should not be narrowed by application of early interpretations of the antitrust statutes.

First, the structure of the statutes is different. Section 4 of the Sherman Act, which became Section 15 of the Clayton Act, set out the courts' jurisdiction, their equitable remedial

---

[5] In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court said it assumed that because Congress used the same words in § 1964(c) as in the Clayton Act, it intended them to have the same meaning. *Id.* at 268 (inferring "proximate cause" requirement). But in *Tafflin*, this Court rejected the same reasoning, where the question was exclusive or concurrent jurisdiction over RICO actions. 493 U.S. at 462. Likewise, this Court rejected the antitrust analogy in *Sedima*, refusing to impose a "racketeering injury" requirement similar to "antitrust injury." 473 U.S. at 498-99. Thus, application of antitrust precedents is far from automatic. Earlier interpretations must yield where different circumstances suggest the words were used with different intent. *See District of Columbia v. Carter*, 409 U.S. 418, 421 (1973); *Erlenbaugh v. United States*, 409 U.S. 239, 244-45 (1972); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

authority, and a limitation of suits to those brought by the government *all in the same section of the statute*:

> Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, . . . under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

Sherman Act, ch. 647, § 4, 26 Stat. 209 (July 2, 1890) (current version at 15 U.S.C. § 4 (2000)); *see also* Clayton Act, ch. 323, § 15, 38 Stat. 736 (Oct. 15, 1914) (current version at 15 U.S.C. § 25 (2000)). This structure, which limited the availability of equitable relief in the same section that authorized it, caused the Court to conclude the act was intended to limit direct proceedings in equity to those instituted by the United States. *See United States v. Cooper Corp.*, 312 U.S. 600, 607-08 (1941); *D.R. Wilder Mfg. Co. v. Corn Prods. Refining Co.*, 236 U.S. 165, 174 (1915); *Minnesota v. Northern Secs. Co.*, 194 U.S. 48, 71 (1904).

By contrast, RICO grants jurisdiction and equitable authority in § 1964(a), which by its terms is not limited to any class of plaintiff. The Attorney General's authorization to institute proceedings is contained in a separate subsection, § 1964(b), which stands parallel to the right of action granted to racketeering victims in § 1964(c). By separating RICO's grant of remedial authority from its specifications of who may sue, Congress made the equitable remedies authorized in § 1964(a) available to any party given a right of action under § 1964.

Second, both the Sherman Act (1890) and the Clayton Act (1914) were enacted prior to the merger of law and equity that occurred with the adoption of the Federal Rules of Civil Procedure in 1937. *See* Fed. R. Civ. P. 2 & adv. comm.

notes; 4 Wright & Miller § 1042. All but one of the cases rejecting a private injunctive remedy under the antitrust laws were also decided before the law/equity merger.[6] At that time, it would have made sense to interpret Sections 4 and 7 of the Sherman Act as providing separately for equitable relief and damages, given that such remedies were pursued in entirely distinct actions. *See* Armistead M. Dobie, *Handbook of Federal Jurisdiction and Procedure* § 147, at 581 (1928) ("[A]n equitable claim . . . cannot be enforced on the law side of the federal District Court, and the same principle prevents the joinder in this court of legal and equitable causes of action in a single suit."). By the time RICO was enacted in 1970, however, it was long accepted that both legal and equitable remedies could be invoked in the same case. *See* Fed. R. Civ. P. 18; 4 Wright & Miller § 1043; *see also Franklin*, 503 U.S. at 70-71. There is no reason to ascribe to the 91st Congress, acting in 1970, the same intent to provide separate legal and equitable remedies that the 51st Congress would have had when it enacted the Sherman Act in 1890.

Third, Congress was certainly aware in 1970 that for the preceding 55 years, the antitrust laws *did* contain a right of action for injunctive relief by private parties. When it recodified the Sherman Act as the Clayton Act in 1914, Congress responded to this Court's decisions rejecting a private injunctive remedy by expressly adding one in Section 16 of the Clayton Act. *See California v. American Stores Co.*, 495 U.S. 271, 287 (1990) (noting "§ 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions"). While it is true that Congress is presumed to be

---

[6] *See Gen. Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 286 (1922); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917); *D.R. Wilder*, 236 U.S. at 174; *Northern Secs.*, 194 U.S. at 71. *Cooper Corporation*, decided in 1941, followed the established body of prior authority. 312 U.S. at 608 n.9.

aware of the background against which it legislates, *see Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-79 (1982), in 1970 that background included an injunctive remedy available to private antitrust plaintiffs, and had done so for half a century. References in RICO's legislative history to bringing antitrust remedies to bear on organized crime, *see, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151-52 (1987); *Sedima*, 473 U.S. at 487, thus should not be read as precluding an injunctive remedy as well.

Fourth, Congress enacted RICO under the criminal code, not the antitrust laws, to *avoid* subjecting private RICO plaintiffs to restrictive antitrust precedents. *See Sedima*, 473 U.S. at 478-79. In *Sedima*, the Second Circuit had done what Petitioners and the United States advocate here: analogized directly from the Clayton Act to RICO, *see id.* at 485, to restrict the reach of RICO. This Court concluded that by doing so, "the court below created exactly the problems Congress sought to avoid." *Id.* at 499.

Finally, RICO's liberal construction mandate removes any doubt. The Sherman and Clayton Acts contained no such directive. Whatever inferences might be appropriate in the antitrust context, they do not apply where Congress has explicitly directed courts to resolve doubts in favor of effectuating RICO's remedial purpose: to eliminate racketeering activity. *E.g., Rotella*, 528 U.S. at 557; *Russello*, 464 U.S. at 26-27.

E. RICO's Legislative History Provides No Basis For Inferring Intent to Remove District Courts' Equitable Jurisdiction

The argument against injunctive relief for victims of racketeering has been constructed largely on the basis of inferences from RICO's legislative history. Resort to legislative history is inappropriate, however, where a statute's

meaning is clear from its language. *Dep't of Housing & Urban Dev. v. Rucker*, 122 S. Ct. 1230, 1234 (2002).

Even if relevant, the legislative history fails to provide decisive guidance. The Ninth Circuit reasoned that Congress' failure to adopt an amendment that contained an explicit injunctive remedy indicated an intent not to include the remedy. *Wollersheim*, 796 F.2d at 1086 (drawing "clear message" that Congress "*rejected* the addition of any such provision"). But the premise that Congress "rejected" the express civil injunctive remedy is simply incorrect. As this Court has pointed out, Congress did not "reject" Representative Steiger's amendment—instead, it was withdrawn without a vote. *See Malley-Duff*, 483 U.S. at 154; *see also* 116 Cong. Rec. 35346 (Oct. 7, 1970).

Moreover, although Representative Poff spoke of an "additional civil remedy" contained in the amendment, the amendment in fact contained *several* new civil remedies—not only express injunctive relief for private parties, but also a damages action for the government, and a right of the government to intervene in suits by private parties. *See* 116 Cong. Rec. 35346; *Malley-Duff*, 483 U.S. at 155. Finally, Representative Steiger noted his belief that the bill as it stood might already include the remedy he proposed, and that his amendment had been intended to confirm it. 116 Cong. Rec. at 35347 (noting that "under the bill as it now stands they may have this option."). In these circumstances, Congress' failure to enact Representative Steiger's proposal cannot be read as a "rejection" of an injunctive remedy in private civil actions, any more than it was a "rejection" of his proposed five-year statute of limitations. *See Malley-Duff*, 483 U.S. at 154-55.

In any event, Congress' failure to enact the Steiger Amendment is "a particularly thin reed on which to rest the interpretation of [the] statute." Pet. App. 12a (No. 01-1118). The Seventh Circuit was correct to heed this Court's caution

that "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (citations omitted). In light of Representative Steiger's statement withdrawing his amendment, this Court's statement in *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), is particularly apt: "'Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" *Id.* at 187 (citation omitted). The legislative history simply cannot carry the weight Petitioners give it.

In sum, the language and structure of § 1964, the presumption of all appropriate remedies for a statutory action to redress injury, this Court's reluctance to infer restriction of courts' traditional equitable powers, and Congress' liberal construction mandate in the RICO statute itself all make clear that the district courts' inherent equitable power to issue injunctions has not been removed in actions brought under § 1964(c).

II. INJUNCTIVE REMEDIES ARE NEEDED BY VICTIMS OF ORGANIZED RACKETEERING ACTIVITY

In this case, the arguments regarding injunctive relief under RICO are colored by concerns about expansive use of the statute to address socially divisive controversies such as abortion protests.[7] But any decision to restrict the remedies available will affect RICO's reach in all contexts, including claims by racketeering victims against traditional organized

[7] *See* Scheidler Br. at 1-2; Operation Rescue Br. at 1-3; Brief *Amicus Curiae* of Life Legal Defense Foundation, at 6-19; Brief *Amicus Curiae* of Seamless Garment Network et al., at 25-30.

criminal groups. Injunctive relief is often vital in such cases to protect racketeering victims from further injury.

This Court should not restrict the remedial reach of RICO because of concerns about unusual uses of the statute.[8] Instead, the Court should be mindful of the strong need for broad RICO remedies, including injunctive remedies for racketeering victims, to address Congress' core area of concern: the threat posed to American businesses by organized racketeering activity. *See Beck*, 529 U.S. at 496 (quoting Pub. L. No. 91-452, § 1, 84 Stat. 922-23); *Turkette*, 452 U.S. at 588-89.

The need for injunctive relief in dealing with defendants who engage in classic racketeering is well illustrated by the events underlying Motorola's RICO lawsuit. In Motorola's case, the district court found that a group of defendants used their family business empire to defraud Motorola of over $2 billion lent to one of the family's corporations, through a pattern of racketeering activity that included, "among numerous other means," wire fraud and extortion. *See Motorola*, 202 F. Supp. 2d at 245-48.[9]

[8] This Court has frowned on efforts to narrow RICO's substantive reach through judicial construction, despite use of the statute in situations removed from traditional organized crime. *See Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 262 (1994); *Sedima*, 473 U.S. at 499. The Court should resist similar arguments for narrowing RICO's remedial reach.

[9] The district court did not reach its conclusions lightly. Judge Rakoff, the author of a leading RICO treatise (Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law & Strategy* (1989)), was well aware of the tendency of litigants to invoke RICO in garden-variety business disputes. He thus stated at the beginning of his opinion that "[w]hen business deals go sour, both sides are apt to cry 'fraud,' and courts know better than to take such claims at face value." *Motorola*, 202 F. Supp. 2d at 241-42. Nonetheless, after conducting a six-day evidentiary hearing, Judge Rakoff concluded that Motorola had shown each element of a RICO claim by clear and convincing evidence, *id.* at 244-45, and that "every preliminary indication is that the defendants . . .

More important, the district court found the risk of further injury necessitated a preliminary injunction. For example, it found the defendants diverted much of the lent money to unauthorized uses, for the benefit of other companies they owned and controlled, leaving over $1 billion unaccounted for. *Id.* The court enjoined any further diversion of assets, to prevent further injury to Motorola and to preserve the assets available for repayment. *Id.* at 248.

The district court also found that defendants had engaged in corporate manipulation to dilute Motorola's collateral. Motorola had bargained for its loans to be secured by a controlling stake in the borrowing corporation. When it appeared Motorola might foreclose on its collateral, the defendants secretly tripled the borrowing corporation's outstanding stock, and then transferred the new shares—representing two-thirds of the corporation's value—to a different company they owned. *Id.* at 246-47. Later, defendants acted further to diminish the voting rights of Motorola's remaining pledged shares, in an attempt to ensure that Motorola could never recover the controlling interest for which it had bargained. *Id.* at 247-48. Again, the district court used its injunctive powers to put a stop to the ongoing fraud. The court ordered the stock pledged as collateral to be deposited in the court's registry, and prohibited further efforts to diminish the control rights or the value of the stock. *Id.* at 248 & n.4. The defendants did not comply, and have been held in civil contempt. *Motorola Credit Corp. v. Uzan*, 2002 WL 1963301 (S.D.N.Y. Aug. 22, 2002).

When Motorola discovered the dilution and began to investigate, the defendants "retaliated by use of fear and extortion," causing a lawyer for their family to initiate baseless criminal charges in Turkey against Motorola

---

perpetrated, and continue to perpetrate, a rather massive swindle." *Id.* at 242.

executives. *Motorola*, 202 F. Supp. 2d at 247. Judge Rakoff found defendants' use of fear of Turkish criminal proceedings to force concessions on repayment of the overdue loans to be "a classic extortion scheme." *Id.*

The district court further found that by repeatedly representing to the court an intention to restore plaintiffs' collateral, "while taking no actions to fulfill their pledge and instead offering sham excuses and false testimony," defendants had "carried their fraud into the court itself." *Id.* at 248.

The harms suffered by Motorola are the model of what Congress had in mind when it passed RICO: economic harm visited on an American business by racketeers acting through a pattern of organized criminal activity. *See, e.g., Beck*, 529 U.S. at 496; *Turkette*, 452 U.S. at 588 (quoting congressional purpose and findings). Moreover, the persistent efforts of the defendants in Motorola's case to conceal, continue, and intimidate others from dismantling their scheme, even after the frauds were discovered, are classic characteristics of traditional organized racketeering. The continuing nature of such racketeering activities shows that damages alone are an inadequate remedy. If the victim and the court cannot stop the racketeering, the victim will have to sue again and again to be made whole. Equity has always stood ready to stop such continuing violations, to prevent the need for such a multiplicity of lawsuits. *See* 11A Wright & Miller § 2944, at 89-90; *Injunctions, supra*, 78 Harv. L. Rev. at 1001.

Congress enacted the private civil remedy in RICO not only to compensate racketeering victims, but to enlist them as "'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella*, 528 U.S. at 557; *accord Sedima*, 473 U.S. at 493. Racketeering victims cannot perform that role, or even protect themselves from further injury, if courts are deprived of their injunctive powers. Even the Ninth Circuit in *Wollersheim* recognized "the force of the

. . . argument that a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business with economic destruction before the business has been brought to its knees." *Wollersheim*, 796 F.2d at 1088-89. The court recognized that the government's resources to bring injunctive actions are often limited, and that "precluding enforcing parties from employing the weapon of equitable relief partially hamstrings the statute's effect." *Id.* at 1089.

Businesses threatened by racketeering activity need the ability to invoke the courts' equitable powers, in order to protect themselves from the ravages of organized racketeering activity. Equity has always provided a remedy to stop continuing violations of legal rights. Congress did nothing in § 1964(c) to eliminate this equitable power.

III. RICO DOES NOT REMOVE THE COURT'S POWER TO PRESERVE THE STATUS QUO THROUGH INTERIM RELIEF

Motorola's experience in dealing with racketeers confirms an additional point: the power to grant *preliminary* relief during the pendency of a RICO case is essential to the effectiveness of *any* civil remedy. District courts have such power by virtue of both the Judiciary Act and the All Writs Act. There is nothing in RICO that removes district courts' authority under these statutes to award *pendente lite* relief during the pendency of civil actions under § 1964(c).

Federal courts have always possessed the power to issue equitable relief to preserve the status quo pending resolution of cases before them. 11A Wright & Miller § 2941, at 30-31, § 2943, at 78-79, § 2947, at 121-23. Such relief is appropriate for two reasons: to prevent irreparable harm while litigation is pending, and to protect the court's power to award meaningful relief at the conclusion of the case. *Id.* § 2947, at 121, 123.

The federal courts' power to award interim relief has statutory sources distinct from the statute creating the right of action. In the first place, this power is part of the courts' equity jurisdiction, granted in the Judiciary Act of 1789. *See Grupo Mexicano*, 527 U.S. at 318-19; *Scripps-Howard*, 316 U.S. at 9-10, 13; 11A Wright & Miller § 2941, at 30-31. Additionally, federal district courts have equitable power, under the All Writs Act, to issue extraordinary writs in aid of their jurisdiction. *See* 28 U.S.C. § 1651 (2000). This Court has interpreted that power to include the power to issue preliminary injunctions to preserve the status quo pending litigation before the federal court. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603-05 (1966); *Scripps-Howard*, 316 U.S. at 10 n.4.

This Court has consistently rejected arguments that specific statutory authorization is necessary to provide interim relief in statutorily authorized actions. *See Yamasaki*, 442 U.S. at 705; *Dean Foods*, 384 U.S. at 608; *Deckert*, 311 U.S. at 288. In *Scripps-Howard*, the Court explained, "Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." 316 U.S. at 11. In the area of interim remedies, the Court has been especially vigilant against inferring restriction of courts' equitable powers. Instead, the Court has insisted on explicit direction from Congress before it will restrict courts' equitable power to issue interim remedies. *See Yamasaki*, 442 U.S. 705; *Dean Foods*, 384 U.S. at 608; *Scripps-Howard*, 316 U.S. at 15; *see also Miller*, 530 U.S. at 337-41 (restricting courts' interim equitable power only in light of unmistakable mandatory language in statute).

Again, the need for interim equitable relief in civil RICO actions under § 1964(c) is well illustrated in Motorola's pending case. Judge Rakoff found a preliminary injunction

was necessary because the fraud and racketeering was ongoing, threatening continuing harm even as the case proceeded. *Motorola*, 202 F. Supp. 2d at 247-48 ("Moreover, defendants' open-ended racketeering scheme continues apace, threatening still further injury to plaintiffs' business and property."). The court pointed to defendants' effort to diminish the voting rights of the stock pledged as Motorola's collateral, and noted the likelihood that defendants would implement those resolutions unless prohibited from doing so. *Id.* at 248 & n. 4. In fact, the defendants registered the resolutions even in the face of Judge Rakoff's order not to do so, drawing a contempt citation. *Motorola*, 2002 WL 1963301.

In this context, the district court found it necessary to invoke its equitable powers in order to protect the pledged assets from further attack, prevent further diversion of the loaned funds and preserve its own power to award meaningful relief at the conclusion of the litigation. *Motorola*, 202 F. Supp. 2d at 248.[10] Because the defendants' continuing course of conduct threatened to make any eventual judgment unrecoverable, the court entered a preliminary injunction, which remains in force today.

As this history indicates, federal district courts cannot be left powerless to deal with ongoing fraudulent behavior by parties over whom they have jurisdiction. Thus federal courts have been vested with power to prevent irreparable harm, and

[10] The court correctly noted that *Grupo Mexicano*, 527 U.S. 308, did not bar relief, because the injunction was not merely to preserve assets for collection of an unsecured debt, but instead was to prevent dissipation of assets subject to plaintiffs' equitable interest. *Motorola*, 202 F. Supp. 2d at 250. *Grupo Mexicano* addressed a preliminary injunction that restrained a party's *lawful* disposition of its own unencumbered property, to support eventual collection of an unsecured debt. It expressly distinguished preliminary injunctions that restrain unlawful conduct, and preserve assets subject to equitable liens. *Grupo Mexicano*, 527 U.S. at 314-15, 325.

to preserve assets that will be subject to the court's eventual judgment. *See Scripps-Howard*, 316 U.S. at 9-10, *Deckert*, 311 U.S. at 286, 288-90; 11A Wright & Miller, § 2947, at 121-23. It would be extraordinary to suggest that a district court confronted with ongoing criminal behavior designed to funnel assets beyond the reach of the court must stand idly by, waiting to award only an eventual money judgment that in the meantime may be made practically worthless.

The suggestion is particularly inapt in the context of a statute that is to be construed liberally for remedial purposes. As noted, the § 1964(c) action is intended "not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella*, 528 U.S. at 557. "The provision for treble damages is . . . justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better." *Id.* at 558. It would be anomalous, to say the least, to conclude that a business currently victimized by ongoing racketeering activity may sue for treble damages as the harm accumulates, but may not obtain the court's protection to stop the crime in progress.[11]

Indeed, it is hard to fathom how an exclusive treble damages remedy would work at all where a vigilant plaintiff is met by determined wrongdoers. It is all too common, as in Motorola's case, for racketeers to seek to defraud investors or creditors by draining the assets of a company under their control. *See, e.g., Motorola*, 202 F. Supp. 2d at 249 (noting

[11] For this reason, the Court should reject any suggestion that interim relief is available only in suits brought by the government under § 1964(b). It would make little sense for Congress to have provided racketeering victims a remedy to restrain racketeering activity permanently under § 1964(a) and § 1964(c), but to have denied the ability to suppress it immediately where it is presently ongoing. *See Rotella*, 528 U.S. at 558 (noting suppression of racketeering activity is "an object pursued the sooner the better").

appropriateness of RICO action "when a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave creditors unpaid") (citation omitted). In such a case, if no interim relief were available to stop the diversion of assets, the defrauded creditor would either have to bring multiple damages suits, to recoup its losses on an ongoing basis, or wait until the conclusion of the illegal scheme—and the complete disappearance of the assets—to bring one suit for all losses. Neither course makes sense. These outcomes would be all the more inexplicable under a statute that places a premium on broad remedies and effective enforcement.

Because this case comes up on review of a permanent injunction, the issue of preliminary relief is before the Court only insofar as it may be related to the permanent injunction question. For the reasons stated above, the Court should affirm that *both* permanent and preliminary equitable relief are available in suits brought by racketeering victims under § 1964(c). But in any event, the Court should clarify that RICO does not remove the district courts' traditional equitable power, founded on different statutory sources, to preserve the status quo and prevent irreparable harm while litigation is pending.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' ruling that district courts may grant injunctive relief in civil actions brought under § 1964(c).

Respectfully submitted,

CHARLES G. COLE
Counsel of Record
HOWARD H. STAHL
STEVEN K. DAVIDSON
BRUCE C. BISHOP
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for *Amicus Curiae*
Motorola Credit Corporation

September 17, 2002

(30) (26)

No. 01-1118, 01-1119

SEP 17

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE FEMINIST MAJORITY FOUNDATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., CENTER FOR REPRODUCTIVE LAW & POLICY, MEDICAL STUDENTS FOR CHOICE, NATIONAL ABORTION FEDERATION, PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH, AND VOTERS FOR CHOICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN G. GEY*
425 West Jefferson
Tallahassee, FL 32306
(850) 644-5467

SHARYN A. TEJANI
FEMINIST MAJORITY FOUNDATION
1600 Wilson Blvd., Suite 801
Arlington, VA 22209
(703) 522-2214

September 17, 2002

**Counsel of Record*

TABLE OF CONTENTS

Page

Table of Authorities.....iii

INTERESTS OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....5

ARGUMENT.....6

I. THE NATIONWIDE CAMPAIGN OF TERROR AGAINST ABORTION PROVIDERS, STAFF, AND CLINICS LIMITS WOMEN'S ALREADY RESTRICTED ACCESS TO REPRODUCTIVE HEALTH CARE.....6

A. Reproductive Health Care Providers Are the Targets of Domestic Terrorism.....6

B. Unchecked Violence Further Restricts Women's Already Limited Access to Reproductive Health Care.....11

II. THE NATIONWIDE INJUNCTION IS NECESSARY TO PROTECT CLINICS FROM VIOLENCE.....15

A. PLAN Used Violence to Shut Women's Health Care Clinics.....15

B. Injunctions Are a Well Established, Effective Method to Ensure Access to Clinics.....17

C. The Petitioners' Nationwide Campaign Requires a Nationwide Response.....19

III. PETITIONERS OBTAINED PLAINTIFFS' PROPERTY AS THOSE TERMS ARE DEFINED BY THE HOBBS ACT.....21

A. The Interests Violated Here Are Property Under the Hobbs Act.....22

B. The Petitioners Obtained Plaintiffs' Property in Violation of the Hobbs Act.....26

CONCLUSION.....28

TABLE OF AUTHORITIES

CASES: **Page**

City of Atlanta v. Operation Rescue, No. D-61462 (Superior Court of Fulton County, March 28, 1990)...19

Fargo v. Lambs of Christ, 488 N.W. 2d 401 (N.D.1992).....18

G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp.2d 233 (S.D.N.Y. 2001).....24

Madsen v. Women's Health Center, 512 U.S. 753 (1994).....14, 17

National Abortion Federation v. Operation Rescue, No. CV 89-1181-AWT (C.D. CA) (May 15, 1989).....19

Northeast Women's Center, Inc. v.McMonagle, 939 F.2d 57 (3rd Cir. 1991), *cert. denied*, 493 U.S. 901 (1989).....18, 22, 26

NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001).....16, 26

NOW v. Scheidler, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999).....16, 17, 21

Operation Rescue v. Planned Parenthood, 975 S.W. 2d 546 (Tex. 1998).....14, 17

CASES: **Page**

Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition for Life Activists, 41 F. Supp. 2d 1130, 1140 (1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002).....8

Planned Parenthood of Massachusetts v. Blake, 631 N.E. 2d 985 (Mass.), *cert. denied*, 513 U.S. 868 (1994).....18

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).....13, 25

Roe v. Operation Rescue, 919 F.2d 857 (3rd Cir. 1990).....18

United States v. Arena, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000).....22, 26

United States v. Bellomo, 176 F.3d 580 (2d Cir.), *cert. denied*, 528 U.S. 987 (1999).....24

United States v. Clemente, 640 F.2d 1069 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981).....26

United States v. Daley, 564 F.2d 645 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978).....22

United States v. Debs, 949 F.2d 199 (6th Cir.), *cert. denied*, 504 U.S. 975 (1992).....24

CASES: Page

United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).....24

U.S. v. DeFusco, 930 F.2d 413 (5th Cir.), *cert denied*, 502 U.S. 885 (1991).....24

United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).....27

United States v. Haimowitz, 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).....27

United States v. Jacobs, 451 F.2d 530, (5th Cir.1971), *cert. denied*, 405 U.S. 955 (1972).....27

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987).....26

United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).....22

United States v. McMillan, 946 F. Supp. 1254 (S.D. Miss. 1996).....8

United States v. Nadaline, 471 F.2d 340 (5th Cir. 1972).....22

United States v. Rindone, 631 F.2d 491 (7th Cir.1980).....27

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).....22

United States v. Scott, 958 F. Supp. 761 (D.Conn 1997).....14

CASES: Page

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).....22

STATUTES:

Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1996).....10, 21

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1960 *et seq*.....15

Hobbs Act, 18 U.S.C. § 1951.....21

MISCELLANEOUS:

1993 Feminist Majority Foundation National Clinic Violence Survey Report, January 22, 2001, *at* http://www.feminist.org/research/cvsurveys/93violence.html.....10

1999 Feminist Majority Foundation National Clinic Violence Survey Report, January 22, 2001, at http://www.feminist.org/research/cvsurveys/1999/1999ClinicSurvey.htm.....11

2000 Feminist Majority Foundation National Clinic Violence Survey Report, January 22, 2001, *at* http://feminist.org/research/cvsurveys/clinic_survey2000.pdf.....10, 11, 15

Alan Guttmacher Institute, *Facts in Brief, Induced Abortion*, 2002, *at* http://www.agiusa.org/pubs/fb_induced_abortion.html.....12

MISCELLANEOUS: Page

Alan Guttmacher Institute, *Women and Societies Benefit When Childbearing Is Planned,* Issues in Brief, March 2002, *at* http://www.agi-usa.org/pubs/ib_3-02.html.....25

Michael Bates, *Woman Arrested in the Wounding of Abortion Doctor,* Associated Press, August 20, 1993.....7

Dan Eggen, *Murder Suspect Arrested in France; Abortion Foe Held in Doctor's Death,* Washington Post, March 30, 2001, A1.....9

Freedom of Access to Clinic Entrances Act of 1993 S. Rep. No. 103-117.....11, 15, 20, 21

Gunman at Abortion Clinic Wounds Two in Springfield, St. Louis Post Dispatch, December 29, 1991, at 3A.....6

Stanley K. Henshaw, *Abortion Incidence and Services in the United States 1995-1996,* Family Planning Perspectives (Nov.-Dec. 1998), *at* http://www.guttmacher.org/pubs/journals /3026398.html.....12

Stanley K. Henshaw, *Factors Hindering Access to Abortion Services,* Family Planning Perspectives, (March/April 1995) *at* www. guttmacher.org/pubs/journals/2705495.html.....13, 14

Hill Sentenced to Death in Clinic Killings, The Baltimore Sun, December 7, 1994, A1.....7

MISCELLANEOUS: Page

Debbie Howlett, *Courage or Crime? Incidents, Reports Spark FBI Probe,* USA Today, January 10, 1995, 1A.....7

Jennifer Lenhart, *Under Seige: At Abortion Clinic, Tension Comes with the Job,* Houston Chronicle, January 15, 1995, A1.....6

Man Booked in Stabbing of Abortion Clinic Doctor, The Advocate (Baton Rouge, Louisiana), January 4, 1997, 2B.....9

National Abortion Federation, Chronological History of Arsons and Bombings, *at* www.prochoice.org.....10

National Abortion Federation, Incidences of Violence and Disruption Against Abortion Providers in the U.S. and Canada *at* www.prochoice.org.....10

National Abortion and Reproductive Rights Action League Foundation *Who Decides? A State-By-State Review of Abortion and Reproductive Rights* (2002).....12, 13

Donald Plummer, *Olympic Blast Still Haunts Officials,* Atlanta Journal and Constitution, February 23, 2002, 9A.....9

Judy Lundstrom Thomas, *Manual Instructions Anti-Abortionists on Bomb-Making,* The Times-Picayune, October 2, 1994, A15.....7

MISCELLANEOUS: Page

United States General Accounting Office *Abortion Clinics, Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, November 1998, GAO Report No. GGD-99-2.....17

Jack Warner, *Rudolph Indicted in Four Bombings*, Atlanta Journal and Constitution, November 16, 2000, 7C.....9

David Weber, *2 Years Later, Abortion Debate Rages; Anniversary of Salvi's Clinic Rampage*, Boston Herald, December 31, 1996, 4.....8

Cindy West, *Shooting: Protest, Random Violence?* Pensacola News Journal, Monday, August 23, 1993, A1.....7

INTERESTS OF AMICI CURIAE

Amici Curiae[1] are organizations dedicated to the protection and expansion of women's reproductive health care. Through the provision of reproductive health care services, education, direct clinic assistance, security training, organizing, advocacy, lawsuits, training of physicians, and legislation our groups have helped reduce the level of violence faced by health care providers and the women who are their patients and increase women's access to quality reproductive health care.

Feminist Majority Foundation ("FMF") is a non-profit organization dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and safe access to abortion and birth control. FMF actively pursues legal protection for reproductive health services and provided legal counsel for Respondent Women's Health Center in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

FMF runs the largest clinic defense project in the nation and has been active in defending clinics throughout the country from attacks orchestrated by the Petitioners. FMF provides security assessments and training for clinic staffs, operates a clinic violence hotline and facsimile warning system, tracks incidences of violence against women's health care clinics, and conducts a yearly social science survey of the extent of violence against abortion providers. The President of FMF, Eleanor Smeal, was the President of the National Organization for Women (NOW) when NOW began this litigation.

---

[1] Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief, in whole or in part, and that no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation and submission of the brief. All parties have consented to the filing of this brief.

Planned Parenthood Federation of America, Inc. (PPFA), a New York not for profit corporation, is the world's oldest and largest voluntary reproductive health care organization. PPFA provides leadership to 132 autonomous affiliates that manage 900 health centers in 47 states and the District of Columbia. PPFA affiliates provide education and medical services to nearly five million women and men a year, including contraceptive services and counseling, cancer screening and evaluation, emergency contraception, HIV testing, infertility treatment, medical and surgical abortion, pregnancy testing and counseling, sexuality education, testing of sexually transmitted disease and infections, prenatal care and sterilization. PPFA's affiliates, staff, and patients have been the targets of hundreds of illegal attacks by anti-abortion extremists – attacks ranging from murder and arson, to illegal invasions, butyric acid attacks, faked anthrax attacks, etc. PPFA and its affiliates are committed to taking every possible step within the bounds of the law to protect the safety of their patients, staff, and facilities and thus are profoundly concerned that the ruling in this case be affirmed.

Center for Reproductive Law & Policy (CRLP) is a non-partisan, non-profit group that uses advocacy both domestically and internationally to ensure access to reproductive rights for all people. Since its founding in 1992, CRLP has either represented directly or filed amicus curiae briefs in every major case involving reproductive rights and health issues before the United States Supreme Court.

Medical Students for Choice is an advocacy organization with nearly 7,000 medical student members in medical schools across the U.S. and Canada. Our mission is to ensure that women receive the full range of reproductive health-care by working to make reproductive health-care a part of standard medical education and residency training. One of the greatest barriers to safe and legal abortion today is the absence of trained providers.

Our medical student members, as many physicians before them, face realistic fears for their personal safety and the safety of their families as a consequence of providing abortion care to women. The deliberate and strategic targeting of medical providers by these defendants is responsible for that fear. It is for that reason that we are amicus curiae in this case.

National Abortion Federation (NAF), a private-non-profit organization founded in 1977, is the professional association of abortion providers in the United States and Canada. Its members include over 350 non-profit and private clinics, women's health centers, Planned Parenthood facilities, and private physicians' offices in 47 states. NAF's members provide over half of the abortions performed in the United States each year. NAF's mission is to promote and enhance the quality of abortion care, ensuring that abortion remains safe, legal, and accessible.

Since its founding, NAF has worked to end anti-choice violence against providers and their patients. Through its Clinic Support program, NAF acts as an advocate for provider protection with all levels of law enforcement; issues timely information alerts and updates about anti-choice violence; maintains statistics on anti-choice violence and a data bank on militant anti-choice groups and individuals; and conducts on site security assessments and training for clinic staff to assist with safety concerns. The extreme harassment employed by anti-choice activists not only places NAF members, health care providers, and patients in danger, but also jeopardizes women's safe access to abortion services.

Physicians for Reproductive Choice and Health (PRCH) is the voice of pro-choice physicians in the United States. A national non-profit, PRCH was created in 1992 by a group of physicians committed to the ideal that every pregnancy should be a wanted pregnancy and that women should have the full range of medical options available when

considering whether to have a child. We work to keep abortion safe, legal, and accessible; encourage and educate around new medical reproductive technology and methods; and promote programs and public education to reduce unintended pregnancy.

The mission of PRCH is to enable concerned physicians to take a more active and visible role in support of universal reproductive health. PRCH is committed to ensuring that all people have the knowledge, access to quality services, and freedom of choice to make their own reproductive health decisions. Staffed since 1995, the organization now has more than 5,000 physician and non-physician supporters, with headquarters in New York and programs in California and Pennsylvania.

PRCH works to support abortion providers and other pro-choice physicians who are faced with violence and harassment because of their support of a legal right and the most common surgical procedure in the United States. Concerned about the declining number of available abortion providers, PRCH offers education, advocacy, and support to pro-choice physicians.

Voters for Choice (VFC) is a national organization dedicated to maintaining the legality of abortion, and combating violence around reproductive health care facilities that impairs the right of access to abortion services. VFC's mission is to educate the public about abortion-related issues, advocate to maintain and solidify women's right to choose, and promote the right of choice through the electoral process. VFC is non-partisan and supports viable Democratic, Republican, and Independent pro-choice candidates through financial contributions, endorsements, and campaign services.

SUMMARY OF ARGUMENT

In the mid-1980's, Joseph Scheidler and his associates began a campaign to terrorize abortion providers, women's health care clinic staffs, and patients. The operation was led by the Pro-Life Action Network (PLAN), an association of anti-abortion extremists' groups. PLAN orchestrated forcible violent blockades and invasions of women's reproductive health care clinics throughout the country. In response to this countrywide onslaught, the National Organization for Women and two clinics, the Delaware Women's Health Organization, Inc. and the Summit Women's Health Organization, Inc., sought a nationwide remedy.

As the Seventh Circuit Court of Appeals correctly concluded, the Petitioners' attacks on clinics and patients were classic extortion—terror used to frighten people into giving up their business rights. The Seventh Circuit also found that the extent of the Petitioners' attacks required a nationwide injunction so that the safety of women's health care facilities would be enhanced. This Court should affirm those decisions.

The first section of this brief reviews the history and extent of violence against women's reproductive health care clinics. The brief then explains the detrimental impact this domestic terrorism has on women's access to health care. It discusses the necessity of the nationwide injunction issued in this case given the nationwide assaults orchestrated by the Petitioners against women's health care clinics. Finally, it focuses on the second question presented, showing how the Petitioners violated the Hobbs Act through their attacks on clinics and patients by obtaining the property of clinics and patients.

ARGUMENT

I. THE NATIONWIDE CAMPAIGN OF TERROR AGAINST ABORTION PROVIDERS, STAFF, AND CLINICS LIMITS WOMEN'S ALREADY RESTRICTED ACCESS TO REPRODUCTIVE HEALTH CARE.

Reproductive health care providers throughout the country have been targets of domestic terrorism by anti-abortion extremists. The Petitioners operated within this climate of violence and helped create parts of it. The violence against women's health care facilities harms women by reducing the number of women's health care clinics and staff.

A. Reproductive Health Care Providers Are the Targets of Domestic Terrorism.

Women's health care providers have been under attack for decades because of the services they provide. Since 1991, eight abortion providers or staff have been murdered; twenty have been wounded, and clinics have suffered massive physical damage.

In 1991, in Springfield Missouri, a masked gunman shot Claudia Gilmore and a second person in the clinic where Ms. Gilmore worked. *Gunman at Abortion Clinic Wounds Two in Springfield*, St. Louis Post Dispatch, December 29, 1991, at 3A. Also in 1991, in Houston, Texas, Dr. Douglas Karpen was shot and wounded in a parking garage near his clinic. Jennifer Lenhart, *Under Seige: At Abortion Clinic, Tension Comes with the Job,* Houston Chronicle, January 15, 1995, A1. In Wichita, Kansas in 1993, Dr. George Tiller was shot at point blank range in his

car as he raised his arms to protect himself. Rachelle Shannon was sentenced to eleven years for the crime. The Army of God Manual, a how-too primer on violence against reproductive health care clinics, was discovered in Shannon's yard. Judy Lundstrom Thomas, *Manual Instructions Anti-Abortionists on Bomb-Making,* The Times-Picayune, October 2, 1994, A15.

In Pensacola, Florida in 1993 after the publication of a Wild West-style "UN-WANTED" poster, Dr. David Gunn was shot and killed at the rear entrance of Dr. Wayne Patterson's clinic while Rescue America[2] staged a protest at the front the clinic. Michael Bates, *Woman Arrested in the Wounding of Abortion Doctor,* Associated Press, August 20, 1993. Michael Griffin was sentenced to life in prison for this killing. The same year, in August in Mobile, Alabama, Dr. Wayne Patterson himself was shot and killed, again after the publication of an "UN-WANTED" poster. Cindy West, *Shooting: Protest, Random Violence?*, Pensacola News Journal, August 23, 1993, A1. Law enforcement identified this crime as a robbery-based murder, rather than abortion-related, even though Dr. Patterson's money was not taken. Debbie Howlett, *Courage or Crime? Incidents, Reports Spark FBI Probe,* USA Today, January 10, 1995, 1A.

Florida was the sight of a double murder in 1994. Dr. John Bayard Britton and volunteer escort Lt. Col. James Barrett were shot and killed in the driveway of a clinic. Paul Hill was sentenced to death for this crime. June Barrett, the wife of Lt. Col. Barrett, was shot and wounded in the attack. *Hill Sentenced to Death in Clinic Killings,* The Baltimore Sun, December 7, 1994, A1.

After the murders of Dr. Gunn, Dr. Britton, and Lt. Col. Barrett, a group of anti-abortion extremists circulated and signed "justifiable homicide" petitions. The one signed

---

[2] Donald Treshman, the founder of Rescue America (Bates, *supra*) was a regional director of PLAN. Trial Transcript p. 3990, Testimony of Joseph Scheidler.

after the murders of Dr. Britton and Lt. Col. Barrett stated in part:

> We, the undersigned, declare the justice of taking all godly action necessary, including the use of force to defend innocent human life (born and unborn). We proclaim that whatever force is legitimate to defend the life of a born child is legitimate to defend the life of an unborn child.
>
> We declare and affirm that if in fact Paul Hill did kill or wound abortionist John Britton and accomplices James Barrett and Mrs. Barrett, his actions are morally justified if they were necessary for the purpose of defending innocent human life. Under these conditions, Paul Hill should be acquitted of all charges against him.

United States v. McMillan, 946 F. Supp. 1254, 1263-1264 (S.D. Miss. 1996). Signers of this "justifiable homicide" petition include leaders of organizations involved in PLAN, including Andrew Burnett (a regional Director of PLAN) (Trial Transcript p. 3990, Testimony of Joseph Scheidler; *Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition for Life Activists*, 41 F. Supp. 2d 1130, 1140 (1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002) (Burnett signed petition)) and Roy McMillan, an organizer of a PLAN conference. Plaintiffs' Ex. 608; *McMillan*, 946 F. at 1263 (McMillan signed petition).

Also in 1994, Shannon Lowney and Leanne Nichols, staff members at two neighboring clinics in Massachusetts, were shot and killed at the reception desks of their respective clinics. Five other people were wounded in these attacks. John Salvi, the man who committed these attacks, died in prison. David Weber, *2 Years Later, Abortion Debate Rages; Anniversary of Salvi's Clinic Rampage*, Boston Herald, December 31, 1996, 4.

In 1996 in New Orleans, Donald Cooper stabbed Dr. Calvin Jackson 15 times outside his clinic. Cooper was then arrested at a Baton Rouge clinic. Cooper was charged with attempted second degree murder. *Man Booked in Stabbing of Abortion Clinic Doctor*, The Advocate (Baton Rouge, Louisiana), January 4, 1997, 2B. In 1997, in Atlanta, Georgia, seven people were injured in two bombings at the Northside Family Planning Clinic. Donald Plummer, *Olympic Blast Still Haunts Officials*, Atlanta Journal and Constitution, February 23, 2002, 9A. The second bomb detonated an hour after the first, targeting law enforcement officials. *Id.* The Army of God has claimed credit for these attacks. Jack Warner, *Rudolph Indicted in Four Bombings*, Atlanta Journal and Constitution, November 16, 2000, 7C Fugitive Eric Robert Rudolph was charged and remains on FBI's Ten Most Wanted list. *Id.* Also in 1997, in Rochester, New York, an unnamed doctor in his home was shot and wounded by a sniper with a high powered rifle. James Charles Kopp remains a primary suspect.[3] Dan Eggen, *Murder Suspect Arrested in France; Abortion Foe Held in Doctor's Death*, Washington Post, March 30, 2001, A1.

In 1998, Dr. Barnett Slepian was shot and killed by a sniper; James Charles Kopp has been indicted for this murder. *Id.* Also in 1998, off-duty police officer Robert Sanderson was killed in a bomb explosion at New Woman, All Women Clinic; clinic nurse Emily Lyons was maimed in the attack. Warner, *supra*. The Army of God has claimed credit for the bombing, and fugitive Eric Robert Rudolph has been charged. *Id.*

From 1977 until 1999 (the year the injunction in this case was issued), as reported to the National Abortion Federation, 161 women's health care facilities were the

---

[3] Three doctors in Canada have also been shot in a sniper-like manner; James Kopp is a suspect in these shootings as well. Eggen, *supra*.

target of arson; 40 were bombed; and 77 clinics were the targets of attempted bombings or arsons. National Abortion Federation, Chronological History of Arsons and Bombings, *at* www.prochoice.org.[4] Together, the arsons and bombings have caused close to 15 million dollars in property damage. *Id.* This accounting does not include the cost of increased security, insurance, and emotional damages.

An annual national social science survey of abortion providers found that in 1993 50% of clinics surveyed had experienced severe violence.[5] *2000 Feminist Majority Foundation National Clinic Violence Survey Report*, 2001, 5 *at* http://feminist.org/research/cvsurveys/clinic_survey2000.pdf (2000 FMF Survey). In 1993, the survey found that 16.9% of clinics had suffered blockades and 14.6% had been invaded. *1993 Feminist Majority Foundation National Clinic Violence Survey Report*, 1993, *at* http://www.feminist.org/research/ cvsurveys/93violence.html. From 1977-1999, there were over 600 clinic blockades and over 300 clinic invasions. National Abortion Federation, Incidences of Violence and Disruption Against Abortion Providers in the U.S. and Canada, *at* www.prochoice.org.

National efforts by women's rights supporters, including this lawsuit and the passage of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. §248, have decreased some of the violence faced by clinics. In 1999 and 2000, 20% of clinics surveyed reported being the

[4] These incidences include only those reported directly to the National Abortion Federation. The actual numbers are even higher.

[5] "Severe Violence" is defined as "blockades, invasions, bombings, arsons, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats, and arson threats." FMF 2000 Survey at 5. The Feminist Majority Foundation's clinic violence survey sends questionnaires to all facilities it can identify as providing abortion services in the United States. In 2000, surveys were sent to 798 providers; 361 responded for a response rate of 45%. Analysis on the received data is conducted using SPSS (Statistical Package for the Social Sciences).

target of extreme violence. 2000 FMF Survey, *supra*, at 5. In 1999, 6% of clinics reported that they had been the targets of blockades and 3% reported invasions. *1999 Feminist Majority Foundation National Clinic Violence Survey Report*, 1999, at www.feminist.org/research/cvsurveys/1999/1999ClinicSurvey.htm. In 2000, 5% of clinics reported that they had been blockaded and 1.4% reported invasions. FMF 2000 Survey at 7.

B. Unchecked Violence Further Restricts Women's Already Limited Access to Reproductive Health Care.

Violence and harassment of abortion providers and staff limit women's access to reproductive health care. According to a Senate Report on FACE:

> Some providers have succumbed to the intimidation and threats. At least three physicians in Dallas stopped performing abortions in 1992 as a result of pressure by anti-abortion groups. In early 1993, after receiving death threats, two doctors stopped working at an abortion clinic in Melbourne, FL. And since Dr. Gunn was shot in March 1993, at least eight more doctors have stopped offering abortion services.

Freedom of Access to Clinic Entrances Act of 1993. S. Rep. No. 103-117, at 17 (1993).

In 1993, after the murder of Dr. Gunn, 23% of clinics surveyed had staff or physicians resign because of violence or harassment. 2000 FMF Survey, *supra*, at 13. In 1999, after the murder of Dr. Barnett Slepian, 10% of clinics surveyed reported that a physician or other staff had quit their jobs as result of anti-abortion violence, harassment, or intimidation. *Id.* In 2000, resignation of staff members was much more likely at clinics experiencing high levels of violence. *Id.* (15% of clinics experiencing high violence

lost staff; 2% of those not experiencing such violence lost staff).

The limitations of services because of violence further curtail women's access to abortion, making it a right for some in theory only. As of 1996, only 14% of U.S. counties had abortion providers. Alan Guttmacher Institute, *Facts in Brief, Induced Abortion*, 2002, *at* http://www.agi-usa.org/pubs/fb_induced_abortion.html. Between 1992 and 1996, the number of abortion providers decreased by 14%. *Id.* For example:

STATE	% of Counties without Abortion Provider	Number Change 1992-1996	% Change 1992-1996
Iowa	96%	-3	-27%
Missouri	96%	-2	-17%
North Carolina	74%	-27	-31%
North Dakota	98%	0	0[6]
Tennessee	93%	13	-39%

Stanley K. Henshaw, *Abortion Incidence and Services in the United States 1995-1996,* Family Planning Perspectives Nov.-Dec.1998, Table 5 *at* http://www.guttmacher.org/pubs/journals/3026398.html.

The shrinking numbers of abortion providers, coupled with other laws that restrict abortion services[7],

[6] North Dakota did not gain or lose any abortion providers from 1992-1996. The number of abortion providers in North Dakota during that time stayed consistent: 1.

[7] Waiting periods and in person counseling requirements of some states mean that women have to visit a clinic twice, again increasing the cost and hardship. 16 states have laws requiring a waiting period ranging from 12 to 24 hours between counseling and abortion. National Abortion and Reproductive Rights Action League Foundation *Who Decides? A State-By-State Review of Abortion and Reproductive Rights* 17 (2002).

create an exceptionally difficult burden for poor women. In addition to the cost of an abortion (which, in most states in most situations is not covered by public funding or insurance[8]), women must budget for traveling to and from the clinic and taking time off from work. In 1992 (when, as noted, the number of abortion providers was higher than in 1996) 8% of women traveled more than 100 miles to get an abortion and 16% traveled 50-100 miles. Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, Family Planning Perspectives, March/April 1995 *at* www.guttmacher.org/pubs/journals/2705495.html. Conversely, the smaller number of providers means that some doctors have to travel from state to state in order to make sure that women's access to abortion is maintained. At trial, Dr. Susan Wicklund related that she would fly from Wisconsin to Fargo, North Dakota. Dr. Wicklund's trips to Fargo were necessary because "it's a very remote area. It's the only clinic in North Dakota, and they were having a real hard time finding physicians to keep it open." Joint Appendix at 115, Testimony of Dr. Susan Wicklund.

When a clinic is closed because of anti-abortion terror tactics, some women lose their only chance to have an abortion. In these cases, anti-abortion extremists successfully deny a woman the right the Constitution guarantees her and force her to accept the extremists' decision of what her future should be. *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and

[8] In 28 states (and the District of Columbia) public funding for abortion is limited to cases of life endangerment, rape, and incest. *Who Decides?, supra,* note 7, at 20.

dissenting in part) (restrictions on abortion deprive a woman of "basic control of her life").

For other women, a closed clinic means waiting longer for an abortion. At trial, Ms. A, a woman carrying a fetus with a condition incompatible with life testified how she traveled to Wichita, Kansas and PLAN's forcible blockade of the clinic there made her postpone her visit for three days. Trial Transcript p. 768, 774, Testimony of Ms. A. For some, the delay increases the possibility of complications and decreases the chances that a provider will be available for the abortion. *See, e.g.*, Henshaw, *Factors Hindering Access to Abortion Services*, *supra*, ("[t]he later in gestation an abortion is performed, the more cervical dilation is needed, the more complex the procedure and the greater the risk of complications; not all providers choose to perform these more difficult procedures"). In those situations where the clinic remains open but the patient has to survive a gauntlet of abuse and harassment, several courts have noted the adverse medical effects on patients. *See, e.g., Madsen v. Women's Health Center*, 512 U.S. 753, 758 (1994) (according to clinic doctor, patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures"); *U.S. v. Scott*, 958 F. Supp. 761, 767 (D.Conn. 1997) ("pushing, blocking, and otherwise interfering with a patient's access can increase the patient's stress level, and thereby increase the risks of a subsequent abortion procedure"); *Operation Rescue v. Planned Parenthood*, 975 S.W. 2d 546, 551 (Tex. 1998) (patients entered "visibly shaken, crying, nervous. Physicians reported increased respiration, heart rate, and blood pressure").

When anti-abortion violence closes down a clinic, it also has the effect of shutting down the only source of any type of reproductive health care for many women. Clinics that provide abortions also provide a wide range of health

related services for women. 2000 FMF Survey, *supra*, at 4 (98% of clinics surveyed provide birth control[9], 91% provide pregnancy counseling, 88% provide emergency contraception, 83% provide testing for sexually transmitted diseases, 77% provide adoption counseling and referrals, 75% provide cancer screening, 67% provide services relating to menopause, 67% provide HIV/AIDS testing, and 22% provide pre-natal care). For example, the Blue Mountain Clinic in Missoula, Montana, offered "prenatal care and delivery, childhood immunizations, diagnosis and treatment of sexually transmitted infections, contraceptive services and first trimester abortions." S. Rep. No. 103-117, *supra*, at 5-6. Seventy percent of the patients in the prenatal program were Medicaid patients; some patients traveled as far as 120 miles to receive health care. In March 1993, the clinic was entirely destroyed by arson. As a result, the clinic was able to serve only a fraction of its former patients. *Id.*

II. THE NATIONWIDE INJUNCTION IS NECESSARY TO PROTECT CLINICS FROM VIOLENCE.

The nationwide injunction issued in this case pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1960 *et seq.*, is a key tool in fighting against the violence that threatens women's health care clinics. This Court should affirm that injunction.

A. PLAN and Operation Rescue Used Violence to Shut Women's Health Care Clinics.

In granting the injunction, the district court listed several acts of violence committed by PLAN and Operation Rescue members, including trapping clinic staff and

[9] Petitioners are also against the use of birth control. Plaintiffs' Ex. 519 p.3.

volunteers against entrances as the volunteers and staff pleaded to be set free; banging on the car of a patient and grabbing her as she tried to enter the clinic; forcibly entering a clinic and destroying medical equipment, tearing down cabinets, and chaining themselves to operating tables; trapping clinic staff and escorts against entrance doors for hours; and assaulting a patient in California who lost consciousness, bled, and had to be rushed to the hospital. *NOW v. Scheidler,* 1999 U.S. Dist. LEXIS 11980, at *6-11 (N.D. Ill. July 28, 1999). As one witness described it:

> Mr. Joseph Scheidler entered our building in Delaware, stormed up the steps with two or three other men with him, came in and stormed his way into our administrator's office, said he was there to "case the joint" and told her that she needed to find another job....I was present at the protest that he had organized and was speaking to the next day, and he had threatened me at that time that he would make sure the clinic was closed down, that he was there to make Delaware and abortion-free state, that our business would be closed, that I would feel the pain and fear that he had announced.

Trial Transcript p. 663-664, 668, Testimony of Susan Hill. The day after Scheidler "cased" the Delaware clinic, "a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. PLAN reported this protest in its newsletter and other public relations documents as 'a fun time.'" *NOW v. Scheidler,* 1999 U.S. Dist. LEXIS 11980, at *16.

Similarly, the Court of Appeals found that the "record is replete with evidence of instances in which [the Petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence." *NOW v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001). The Court of Appeals also noted that one tactic used by the Petitioners was to threaten clinics into shutting down by promising that if the clinic did

not shut down voluntarily, it would be closed through the Petitioners' actions—a classic example of extortion.

In addition, the jury found that the Petitioners had committed 117 acts of force and four acts of violence as part of their campaign to close down women's clinics. The jury specifically stated that *none* of its verdicts regarding extortion were based on blockading alone. 1999 U.S. Dist. LEXIS 11980, at *36 n.6.

B. Injunctions Are a Well Established, Effective Method to Ensure Access to Clinics.

Enjoining violence, blockades, invasions, harassment, and noise are well-established, effective means of protecting women's health clinics. *See, e.g., Madsen v. Women's Health Center,* 512 U.S. 753 (1994). Both clinics and law enforcement officials credit injunctions with limiting violence. In a Government Accounting Office survey, several clinics and law enforcement respondents pointed to injunctions as a reason that anti-abortion violence had been reduced. United States General Accounting Office, *Abortion Clinics, Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, November 1998, GAO Report No. GGD-99-2, 13-14.

Other courts faced with the tactics of the Petitioners and their organizations consistently have found that these Petitioners committed violent acts in their attempts to limit women's access to reproductive health care and have issued injunctions against them. In *Operation Rescue v. Planned Parenthood,* anti-abortion extremists "invaded the premises [the clinic] and chained their necks to cement blocks or to fixtures within the clinic. Bottles and rocks were thrown at buildings, and locks were glued shut." 975 S.W.2d at 550. At the time of these invasions and after, several clinics suffered butyric acid attacks. *Id.* The district court enjoined Operation Rescue from "damaging any part of the

[respondent clinics'] premises, facilities and parking lots" and "[t]ouching, physically abusing, intimidating, or harassing any individual attempting to enter or exit the facilities or parking lots of [clinics]." *Id.* at 551.

In *Planned Parenthood of Massachusetts v. Blake*, which included Operation Rescue and PLAN of Arlington as defendants, the tactics used by the defendants, which included invasions and locking themselves to objects within the clinic, were adjudicated threats under Massachusetts law. The court found that the defendants "presented frightening, threatening and impermeable physical obstacles to patients" and that a reasonable woman "seeking an abortion would be threatened, intimidated or coerced by the defendants' conduct." 631 N.E.2d 985, 990-991 (Mass.), *cert. denied*, 513 U.S. 868 (1994). The court enjoined the defendants from obstructing access to clinics and from using force against patients or staff of clinics. *Id.* at 993 n.16.

In *Fargo v. Lambs of Christ*, a case in which Operation Rescue also was a defendant, the evidence included "repeated incidences where protesters invaded the clinic, approached patients or clinic employees in a physically threatening manner, [and] actually struck or restrained patients or employees." 488 N.W. 2d 401, 406 (N.D. 1992). The defendants were enjoined from, among other actions, "harassing, intimidating, or physically abusive conduct." *Id.* at 410-411. In *Northeast Women's Center, Inc. v. McMonagle*, the court found that the defendants[10] "unlawfully entered the Center's facilities on four occasions, and that they illegally and violently interfered with the activities of the Center by means of both intimidation and physical attacks on patients and employees of the Center." 939 F.2d 57, 59 (3d Cir. 1991), *cert. denied*, 493 U.S. 901 (1989). The defendants were enjoined from entering or

[10] The lead defendant in *Northeast Women's Center*, Michael McMonagle, was a member of Operation Rescue. *Roe v. Operation Rescue*, 919 F.2d 857, 871 (3d Cir. 1990).

blockading clinics and from abusing, assaulting, or battering patients and staff. *Id.* at 72. In *City of Atlanta v. Operation Rescue*, the court found that the defendants "exceed[ed] the lawful bounds of activity protected by the First Amendment to the United States Constitution" by "assaulting, tortuously harassing, and following sometime for great distances patients, their families and friends, employees, medical practitioners." Plaintiffs' Ex. 926, *City of Atlanta v. Operation Rescue*, No. D-61462 (Superior Court of Fulton County, March 28, 1990). The court enjoined the defendants from, among other activities, abusing and assaulting clinic workers and staff. Plaintiffs' Ex. 927. In *National Abortion Federation v. Operation Rescue*, the defendants were preliminarily enjoined from "physically abusing persons entering or leaving, working at or using any services at any facility at which abortions are performed." Plaintiffs' Ex. 1077, *National Abortion Federation v. Operation Rescue*, No. CV 89-1181-AWT (C.D. CA) (May 15, 1989).

Attacks against reproductive health care clinics by the Petitioners and their organizations have the potential of dramatically increasing if the injunction in this case is dissolved. Removing the district court's injunction would embolden the lawlessness of PLAN and its associates and would waste precious law enforcement and judicial resources by forcing clinics, prosecutors, and police to bring individual suits to protect individual facilities.

C. The Petitioners' Nationwide Campaign Requires a Nationwide Response.

From its inception, PLAN's nationwide scope set it apart from prior anti-abortion activities; PLAN's goal was to shut down women's clinics across the country. Plaintiffs' Ex. 4A; Trial Transcript p. 976, Testimony of Maureen Burke, Coordinator of NOW's Project Stand Up for Women (describing NOW's monitoring of Scheidler's and PLAN's

activities). In a fundraising letter, Scheidler claimed to have visited 40 cities within the United States, organized the first national "activist" anti-abortion conference, and met with representatives from 34 countries in Rome, Italy. Plaintiffs' Ex. 650. As described by Scheidler in 1984, "I think it was a very good thing for us to get together in Fort Lauderdale and organize this kind of pro-life mafia to work in concert on important activists programs. I think we are obliged to give strong leadership to all the new people who want to get active." Plaintiffs' Ex. 647. The schedule of PLAN's activities in 1984-1985 included numerous nationwide action days. Plaintiffs' Ex. 721.

Similarly, Operation Rescue, a project created by PLAN and a Petitioner in this case, advertised its actions on a national scale and organized attacks throughout the country. S. Rep. No. 103-117, *supra,* at 12-13 (testimony of Attorney General Janet Reno "much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of the country"; testimony of New York Attorney General Robert Abrams describing litigation brought by his office against Operation Rescue leaders from California, Georgia, Virginia, and elsewhere).

Faced with an unprecedented nationwide attack strategy, the clinics and NOW sought to defend themselves with a nationwide lawsuit. Use of federal law and federal courts for this action was the logical response to the national scope of the attacks and a reflection of the fact that the patchwork of state laws, coupled in some cases by lax or non-existent enforcement of those laws, did not provide adequate coverage for individual clinics or the women who attempted to use them for health care. *Id.* at 13, 19 (David R. Lasso, City Manager and Former City Attorney of Falls Church, Virginia, testifying that attacks against providers have been organized as a national campaign with individuals

coming in from other states, limiting the ability of his jurisdiction to act; Sheriff James T. Hickey of Nueces County, Texas, testifying that because he opposes abortion "he does not believe the law should be enforced against those attempting to stop abortions").

The district court's nationwide injunction must stay in place even though FACE has passed. Indeed, the district court specifically found that Petitioners' blockades and attacks on clinics had continued even with FACE in place. *NOW v. Scheidler,* U.S. Dist. LEXIS 11980, at *51-52 (noting evidence of Petitioners' continued illegal conduct post-FACE, including a butyric acid attack in Florida during Operation Rescue's National Week of Rescue in 1998, blocking clinic doors and physically accosting patients in Chicago in 1996, and, since 1994, weekly "lock and blocks" in Milwaukee where Petitioners locked their bodies to automobiles). The court stated that a nationwide injunction was necessary because of the national scope of Petitioners' activities, Petitioners' willingness to cross state lines to close abortion clinics, and the "blitzkrieg" nature of Petitioners' actions that made obtaining individual FACE injunctions difficult. *Id.* at *52.

III. PETITIONERS OBTAINED PROPERTY AS THOSE TERMS ARE DEFINED BY THE HOBBS ACT.

The Hobbs Act prohibits the use of force or violence or threat of force or violence to obtain property with the consent of the victim. 18 U.S.C. § 1951(a). As found by the jury, the district court, and the Court of Appeals, the Petitioners' acts of violence and force clearly met this definition.

A. The Interests Violated Here Are Property Under the Hobbs Act.

The concept of property employed by the Hobbs Act "includes, in a broad sense, any valuable right considered as a source or element of wealth." *United States v. Tropiano*, 418 F.2d 1069, 1075-1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) ("property extorted was the right...to solicit business free of territorial restrictions wrongfully imposed by competitors"); *see also United States v. Arena*, 180 F.3d 380, 392 (2d Cir.), *cert. denied*, 531 U.S. 811 (1999) ("[w]hile often the property involved is an existing physical asset, the concept is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business."); *Northeast Women's Center*, 868 F.2d at 1359.

Cases applying the Hobbs Act in the context of extortionate attempts to close or interfere in a variety of businesses uniformly conclude that intangible as well as tangible property is covered by the statute. *See, e.g., United States v. Margiotta*, 688 F.2d 108, 134 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (extortion in connection with the distribution of insurance commissions and maintaining the position of County Broker of Record); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) ("property extorted was the right...to make a business decision free from outside pressure"); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (property extorted is unrealized profits from potential customers); *Tropiano*, 418 F.2d at 1075-76 (2d Cir. 1969). Thus, the Hobbs Act is violated in situations where "as a consequence of the extortion the operations of the business have been delayed, obstructed or in some way affected." *United States v. Daley*, 564 F.2d 645 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). This definition of property easily encompasses the damage done

to the clinics and patients in this case—the deprivation of the right to enjoy the benefit of their lawful business contracts with each other.

The evidence introduced at trial graphically catalogs the Petitioners' multiple violations of the Act. The Petitioners' assaults on clinics in this case had a direct economic impact on the clinics and patients. The most obvious examples of economic impact on the clinics are the destruction of the clinics' medical apparatus and other property, the physical assaults on individuals working for the clinics or seeking to do business with them, the blockings and invasions of clinics, and the threats to carry out such destruction. *See, supra*, § IIA. These actions have the specific purpose of shutting down the operations of ongoing economic entities--i.e, the clinics--by destroying the physical necessities of the operation or by intimidating the clinics' clients and employees. This is precisely the type of activity covered by the Hobbs Act. The clinics have a physical existence, the destroyed material was used in operations that have commercial value, and the damage to facilities will inevitably cause the clinics to forego economically valuable activity. To the extent that the Petitioners' activities resulted in the diminution of economic activity, these activities involve property in its most basic sense--economic exchange of goods and services for money.

Although the damage done by Petitioners to the clinics is the most obvious type of property damage in this case, the damage to the property of the clinic patients is just as real. In one sense, the injuries to clinic patients are equally economic as the injuries to the clinics themselves. The injuries to the clinic patients are the direct consequence of the economic damage to the clinics--indeed, the economic injuries to clinic patients are mirror images of the economic injuries to the clinics. At the same time Petitioners have deprived the clinics of a valuable economic commodity in their right to do business, they also have deprived the

potential clinic patients of the ability to partake in the market for abortion or health care services. The reduction in economic activity, and the impact on "property" in the sense of "the right to contract," is identical with regard to the clinics and their patients. *See, e.g., U.S. v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied*, 502 U.S. 885 (1991) (time and money wasted by prospective customers attending fake prize give-away lost property under mail fraud act).

Even if the clinic patients are viewed as separate claimants entirely divorced from their economic relationship with the clinics, the patients have still been deprived of property, as defined by the Hobbs Act, in the form of their right to contract for medical services like abortion and birth control. Lower courts have regularly analyzed threats to the right to vote in union elections as violations of the Hobbs Act; the property right in these cases is the right of union members to vote freely for the union representative of their choice. "The right of the members of a union to democratic participation in a union election is property; that the right is intangible does not divest it of protection under the Hobbs Act." *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir.), *cert. denied*, 528 U.S. 987 (1999). *See also United States v. Debs*, 949 F.2d 199, 201 (6th Cir.), *cert. denied*, 504 U.S. 975 (1992) (rejecting the argument that the "loss of the opportunity to nominate, vote, assemble, and speak is a deprivation of rights rather than property" and holding that "[i]ntangible property within the meaning of the Hobbs Act includes . . . rights" provided under the federal Labor-Management Reporting and Disclosure Act); *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281-82 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) ("we conclude that the membership's intangible property right to democratic participation in the affairs of their union is properly considered extortable 'property' for purposes of the Hobbs Act"); *c.f. G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp.2d 233, 257-258 (S.D.N.Y. 2001) (right to petition

Congress not property under Hobbs Act, but cases involving abortion providers and patients distinguished).

Similar to the inability to participate in full and free union elections, denial of the right to contract for medical services such as abortion and birth control carries with it severe economic consequences. This Court has recognized the personal and economic ramifications for women who are forced against their will to carry a pregnancy to term. In reaffirming the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), this Court noted in *Casey* that: "[A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." 505 U.S. at 852 (1993) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *Casey*, 505 U.S. at 856 ("[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"); *see also*, Alan Guttmacher Institute, *Women and Societies Benefit When Childbearing Is Planned*, Issues in Brief, March 2002, *at* http://www.agi-usa.org/pubs/ib_3-02.html ("being able to plan their families opens new opportunities for women, and women who take advantage of these opportunities have an increased need for family planning"). The economic consequence of becoming pregnant or carrying a pregnancy to term is at least as significant as those stemming from a union election. The use of extortion to deprive a woman of a Constitutionally protected option for dealing with an unwanted pregnancy and other forms of reproductive health care must, therefore, be considered a deprivation of property within the meaning of the Hobbs Act.

B. The Petitioners Obtained Respondents' Property in Violation of the Hobbs Act.

Petitioners' contention that they have not obtained property in violation of the Hobbs Act fares no better than their argument that no property is involved in this case. Petitioners argue that they did not obtain the clinics' and patients' property because Petitioners did not receive the economic value that the Respondents were forced to forego because of Petitioners' illegal conduct. With regard to this issue, the Court of Appeals properly held that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *NOW*, 267 F.3d at 709 (internal citations and quotations omitted).

Other lower courts agree with the extensive Seventh Circuit precedent on this subject. These courts have held consistently that "lack of an economic motive does not constitute a defense to Hobbs Act crimes." *Northeast Women's Center*, 868 F.2d at 1350. "[W]hether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act." *United States v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir.) *cert. denied*, 454 U.S. 820 (1981). "The loss to the victim is the gravamen of the offense." *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987).

This is the most logical interpretation of the statutory language. As the Second Circuit Court of Appeals has noted, "[a] perpetrator plainly may 'obtain[ ]' property without receiving anything, for obtaining includes 'attain[ing]. . . disposal of,'; and 'disposal' includes 'the regulation of the fate. . .of something.'" *Arena*, 180 F.3d at 394 (internal citations omitted). Other lower courts uniformly have adopted this interpretation of the Hobbs Act.

See, e.g., United States v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir.1980); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir.1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Jacobs*, 451 F.2d 530, 535 (5th Cir.1971), *cert. denied*, 405 U.S. 955 (1972).

Any other interpretation of the Hobbs Act would reduce the act to covering only the narrowest range of *quid pro quo* extortionate activity. There is no evidence Congress intended such a limited result when it passed the Hobbs Act, and the lower courts consistently have avoided adopting this restrictive interpretation of the statute. This Court likewise should hold that Petitioners have obtained property by causing massive disruptions in the businesses of clinics and thereby harming the interests of the clinics and their patients.[10]

[10] Assuming, *arguendo*, that the Hobbs Act required that the defendant receive an economic benefit from the extortion, the facts of this case meet that standard. PLAN and Operation Rescue routinely relied upon the fact that they or their leaders had helped shut down clinics as a tool for fundraising. For example, a newsletter requesting donations related how Scheidler and other leaders of his group were arrested during blockades of clinics in New York. Plaintiffs' Ex. 165.

CONCLUSION

In a civil and democratic society, violence cannot be used to determine public policy. The ongoing severe violence against reproductive health care providers must be stopped. The Petitioners used a nationwide campaign of force and violence to shut down women's health care clinics. The jury, district judge, and Court of Appeals recognized the Petitioners' actions for what they are—extortion. This Court should affirm that holding and the nationwide injunction.

Respectfully Submitted,

Steven G. Guy*
425 West Jefferson
Tallahassee, FL 32306

Sharyn A. Tejani
The Feminist Majority Foundation
1600 Wilson Blvd. Suite 801
Arlington, VA 22209

*Counsel of Record

(31) (97)

Nos. 01-1118, 01-1119

SEP 17 2002

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

OPERATION RESCUE
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, ET AL. IN SUPPORT OF RESPONDENTS

(LIST OF AMICI CURIAE ON INSIDE COVER)

Of Counsel
BONNIE J. CAMPBELL
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE R. KUCIK
Counsel of Record
J. MARCUS MEEKS
BONNIE L. KANE
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6084

LIST OF AMICI CURIAE

The Religious Coalition for Reproductive Choice, Disciples for Choice, Americans for Religious Liberty (ARL), The American Humanist Association (AHA), The National Council of Jewish Women, Inc. (NCJW), United Church of Christ Justice and Witness Ministries, Lutheran Women's Caucus, The Women's Rabbinic Network of the Central Conference of American Rabbis, The Unitarian Universalist Association

QUESTIONS PRESENTED

1. Whether a private party may obtain injunctive relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

2. Whether the use of force, violence and fear to induce medical clinics to stop providing reproductive health services to their patients is extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 3

SUMMARY OF ARGUMENT 6

(1) Injunctive Relief is Legally Appropriate in Private RICO Lawsuits 6

(2) Intangible Property Rights are Protected Against Extortion by the Hobbs Act 7

ARGUMENT 8

I. RICO AUTHORIZES THE DISTRICT COURTS TO GRANT INJUNCTIVE RELIEF IN PRIVATE LAWSUITS 8

A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs 8

B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs 10

Table Of Contents Con't

Page

C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result 12

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties 14

II. THE USE OF FORCE, VIOLENCE OR FEAR TO PREVENT A BUSINESS FROM EXERCISING CONTROL OVER ITS INTANGIBLE PROPERTY RIGHTS IS EXTORTION UNDER THE HOBBS ACT 15

A. Hobbs Act "Property" Includes Intangible Things of Value and the Right to Use and Control Them 15

B. An Extortionist "Obtains" a Victim's Intangible Property Rights When He Prevents the Victim From Using or Exercising Control Over Those Rights 18

C. Defendants' Liability will not Convert Constitutionally Protected Acts of Peaceful Civil Disobedience into Illegal Extortion 20

CONCLUSION 22

APPENDIX A-- Statements of Each Amicus Curiae 1a

TABLE OF AUTHORITIES

FEDERAL CASES

Cases Cited **Page**

Aetna Casualty & Surety Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984) 11

Bell v. Hood, 327 U.S. 678 (1946) 12

Buchanan v. Warley, 245 U.S. 60 (1917) 16

Califano v. Yamasaki, 442 U.S. 682 (1979) 10

Carpenter v. United States, 484 U.S. 19 (1987) 16

Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528 (W.D. Pa. 1984) 10

Evans v. United States, 504 U.S. 255 (1992) 17

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 10, 12

G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp. 2d 233 (S.D.N.Y. 2001) 16

McNally v. United States, 483 U.S. 350 (1987) 16

Table Of Authorities Con't

Cases Cited **Page**

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) 11

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 5, 20, 22

NOW, Inc. v. Scheidler, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. Jul. 16, 1999) 6, 14

NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, _ U.S. __, 122 S. Ct. 1604 (2002) 4, 5, 6, 7, 20

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) 15, 18

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 22

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 6

Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985) 11

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 9

Table Of Authorities Con't

Cases Cited Page

United States v. Arena, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000) 15, 18, 19

United States v. Cullen, 454 F.2d 386 (7th Cir. 1971) 22

United States v. Debs, 949 F.2d 199 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992) 15

United States v. Green, 350 U.S. 415 (1956) 19

United States v. Hathaway, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) 15, 16

United States v. Hoelker, 765 F.2d 1422 (9th Cir. 1985.), *cert. denied*, 415 U.S. 1024 (1986) 15

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) 15, 16

United States v. Mitchell, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) 21

Table Of Authorities Con't

Cases Cited Page

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) 15, 19, 20

United States v. Stephens, 964 F.2d 424 (5th Cir. 1992) 15, 20

United States v. Stillo, 57 F.3d 553 (7th Cir.), *cert. denied*, 516 U.S. 945 (1995) 19

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 15, 16, 18, 20

United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) 15, 20

STATE CASES

Cases Cited Page

People ex rel. Short v. Warden of City Prison, 130 N.Y.S. 698 (N.Y. App. Div. 1911) 17

People v. Barondess, 16 N.Y.S. 436 (N.Y. Sup. Ct. 1891), *dissent adopted*, 31 N.E. 240 (N.Y 1892) 17

People v. Spatarella, 313 N.E.2d 38 (N.Y. 1974) 17

Table Of Authorities Con't

Cases Cited	Page
Spann v. City of Dallas, 235 S.W. 513 (Tex. 1921)	18

FEDERAL STATUTES

Statutes Cited	Page
15 U.S.C. § 15	12
15 U.S.C. § 25	13
15 U.S.C. § 26	13
18 U.S.C. § 1951	6, 7
18 U.S.C. § 1962	8, 9, 12
18 U.S.C. § 1964	*passim*
Pub. L. No. 91-452, § 904(a), 84 Stat. 922 (1970)	11

MISCELLANEOUS

89 Cong. Rec. 3217 (1943)	21
73 C.J.S. § 5 (1983)	17
Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (Harvard University Press 1942)	3

Nos. 01-1118, 01-1119

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ET AL.
Petitioners,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

OPERATION RESCUE
Petitioner,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE
RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, ET AL.
IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are voluntary associations of persons committed to the principle that every woman must be free to decide if and when to have children according

to the dictates of her conscience and religious beliefs. [1] Amici view reproductive choice as an element of religious liberty; they promote this belief through education and outreach programs. [2]

Religious liberty can flourish only in a society that respects the full panoply of human beliefs and the dignity of all persons whatever religious or social views they may espouse. Unrestricted debate on social and religious issues, along with peaceful acts of civil disobedience to bring about social change, are fundamental aspects of this ethic. Violence is incompatible with it.

Petitioners have engaged in a lengthy national campaign of threats and violence against women seeking medical care from reproductive health clinics and against the clinics themselves, often in the name of religion and always invoking their constitutional right to oppose abortion. The lower courts applied federal law to prohibit petitioners' violent efforts to impose their views on others, yet allowed petitioners to peacefully assemble, speak and pray in furtherance of their beliefs. Those courts, in our view, struck the proper balance between

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the amici curiae, their members or counsel, made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk.

[2] Individual statements of the amici curiae are attached in the Appendix.

protecting the constitutional freedom to peaceably advocate social change while prohibiting the violent curtailing of the freedom of others to act differently and to adhere to different beliefs. It is important to us and to all who seek peaceful social change that our activities not be tarnished by the false invocation of religious and constitutional freedom to justify violence, threats and fear.

The legal theorist Zechariah Chafee once observed, "[m]ost of us believe that our Constitution makes it possible to change all bad laws through political action. We ought to disagree vehemently with those who urge violent methods, and whenever necessary take energetic steps to prevent them from putting such methods into execution." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 178 (Harvard University Press 1942). We see this Court's upholding of the Seventh Circuit's decision as an important step in the ongoing process of vigilantly protecting our constitutional rights while preventing their corruption by the use of force and violence in place of appeals to reason.

INTRODUCTION

The Seventh Circuit affirmed a jury verdict that petitioners (defendants below) had violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by using actual and threatened force and violence to prevent patients of medical clinics which perform abortions from availing themselves of the clinics' services.

> [P]rotesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious

> conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

NOW, Inc. v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001), *cert. granted*, __ U.S. __, 122 S. Ct. 1604 (2002). Noting that "[a]ll parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions," the court made clear that this peaceful conduct was not actionable: "We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct." *Id.* at 700.

The critical distinction between defendants' constitutionally protected rights of speech, assembly and religion and their unlawful acts and threats of violence was highlighted in the nationwide injunction entered by the district court to implement the jury verdict. The defendants are enjoined from--

> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any

> building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic; [and]
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic. . . .

Id. at 705. These restraints are circumscribed by the injunction's explicit limitations, which allow defendants to peacefully picket, to make speeches, to talk to prospective clinic patients, to hand out literature and to pray on public property in front of a clinic. *Id.*

The decisions below, in short, carefully followed the guidelines set by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), for the proper adjudication of social protests containing a mixture of protected and illegal activities. The lower courts manifestly did not interfere with defendants' constitutionally protected rights of free speech, assembly and religion. On the contrary, they honored those rights and expressly protected them in the injunction.

The issues before this Court therefore raise no constitutional challenge, focusing instead on interpreting the federal statutes the lower courts employed to insure

"[t]he protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment. . . ." *Scheidler*, 267 F.3d at 702. These issues of statutory construction concern the scope and proper implementation of RICO's injunctive provisions and the use of the Hobbs Act, 18 U.S.C. § 1951, to protect intangible property rights from extortion. We believe that both issues were correctly decided by the Seventh Circuit.

SUMMARY OF ARGUMENT

(1) Injunctive Relief is Legally Appropriate in Private RICO Lawsuits

Following a jury verdict for respondents (plaintiffs below), the District Court for the Northern District of Illinois enjoined defendants for a twelve year period from engaging in the illegal conduct that violated RICO. *See NOW, Inc. v. Scheidler*, No. 86-C-7888, 1999 U.S. Dist. LEXIS 11980, at *59-64 (N.D. Ill. Jul. 16, 1999). The Seventh Circuit affirmed, holding that 18 U.S.C. § 1964 authorizes injunctive relief in a suit by private plaintiffs. *See NOW, Inc. v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001). The Ninth Circuit, the only other Circuit to directly address this issue, held in *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), that a RICO injunction was not available to private plaintiffs.

Acknowledging the *Wollersheim* decision, the Seventh Circuit disagreed with the Ninth Circuit's interpretation of and reliance on RICO's conflicting legislative history. Finding RICO's text to be unambiguous, the Seventh Circuit held that reference to

legislative history to contradict the statutory language would be inappropriate, *Scheidler,* 267 F.3d at 695-96, 699, and that 18 U.S.C. § 1964 plainly authorizes the district courts to grant injunctive relief to all RICO plaintiffs, private as well as governmental. *Id.* at 697-98.

The Seventh Circuit's conclusion is supported by a fair reading of RICO's language, as it gives effect to all subsections of § 1964. In addition, nothing in § 1964 can fairly be read to eliminate the district courts' inherent authority to grant injunctive relief to private plaintiffs even if § 1964 itself did not independently confer equitable powers on the courts when they are deciding private RICO lawsuits.

(2) Intangible Property Rights are Protected Against Extortion by the Hobbs Act

The Hobbs Act criminalizes activity that "obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion. . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

It has long been settled that the "property" protected by the Hobbs Act is not limited to tangible assets, but also includes intangible property rights that contain an element of wealth or potential economic benefit which the property owner has the power to use and control. It logically follows, then, that an extortionist violates the Hobbs Act by wrongfully obtaining control over the intangible property rights of his victim even

though he does not receive any physical items. The Seventh Circuit correctly held that the term "obtaining," as applied to intangible property covered by the Act, is satisfied when the extortionist uses threatened or actual force, violence or fear to wrest from the victim the power to use or control its intangible property rights, as defendants did here.

ARGUMENT

I. RICO AUTHORIZES THE DISTRICT COURTS TO GRANT INJUNCTIVE RELIEF IN PRIVATE LAWSUITS

A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs

RICO's civil remedy provisions, 18 U.S.C. § 1964, are contained in three subsections. The first, subsection (a), is a straightforward grant of equitable power to the district courts "to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders." It goes on to delineate a non-exclusive list of permissible forms of equitable relief.

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Subsection (a) neither identifies nor limits the RICO plaintiffs who may receive injunctive relief. It thus creates an equitable right that is coextensive with the right to sue to enforce the substantive prohibitions of RICO § 1962. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The parties who may sue as RICO plaintiffs are identified in § 1964's subsections (b) and (c). Section 1964(b) authorizes the government to "institute proceedings under this section," adding that the government may request preliminary injunctive relief and accept performance bonds from the defendants. Subsection (c) authorizes private persons who are injured in their "business or property by reason of a violation of section 1962" to "sue," adding that they shall recover treble damages and their costs, including reasonable attorney fees.

Subsections (b) and (c) do not expressly reference § 1964's subsection (a). Neither subsection expressly limits the scope of subsection (a), and neither expressly states that one RICO plaintiff but not others may sue to enforce § 1964's equitable provisions. As written, the statute authorizes private plaintiffs to sue for the equitable relief sanctioned in subsection (a) for the same reason that the government is so authorized: the natural

reading of § 1964 as a whole is that subsection (a) applies with equal force to all parties identified in the subsections following it. *See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984), where the court denied defendants' motion to strike plaintiff's claim for equitable relief holding that § 1964(a) applies equally to private plaintiffs and the government.

To hold otherwise, this Court would need to effectively amend subsection (b) by inserting the word "only" into its text, making the lead sentence read "[Only] the Attorney General may institute proceedings under this section." That concoction of exclusivity would improperly change the sentence's plain meaning -- a grant to the government of a non-exclusive right to sue for equitable relief under § 1964(a).

B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs

In *Franklin v. Gwinnett County Pub. Sch.*, this Court reiterated the long-standing presumption that "all appropriate remedies" are available under a statute that provides a private right of action "unless Congress has *expressly indicated* otherwise." 503 U.S. 60, 66 (1992) (emphasis added). "[A]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

Nothing in RICO's language can fairly be read to prohibit federal district courts from using their historical authority to grant equitable relief to private plaintiffs

when appropriate. Judge Rakoff of the Southern District of New York recently so held, concluding that RICO "nowhere expressly denies courts this [injunctive] power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails." *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002). See, to the same effect, *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984). That interpretation of RICO is correct.

Section 1964(a)'s failure to identify the parties that may seek equitable relief does not exclude any party from its scope even inferentially, let alone expressly. As noted above, subsection (b)'s authorization of governmental equitable proceedings is not exclusive on its face. And subsection (c)'s grant of a treble damage remedy to private parties is hardly an express indication that those parties are precluded from obtaining equitable relief. Section 1964, in short, does not affect the district courts' traditional equitable powers.

This conclusion is reinforced by Congress' directive that RICO should be "liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). As this Court has noted, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985). Any ambiguity in the text is therefore clarified by the Congressional mandate to liberally construe § 1964 to "prevent and restrain" RICO violations. The courts below properly granted injunctive relief to the plaintiffs so as to effectuate RICO's remedial purpose and "make good the wrong

done." *See Franklin*, 503 U.S. at 66, *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946).

C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result

Comparing the similar language of RICO § 1964(c)[3] and § 4 of the Clayton Act,[4] defendants argue that since § 4 has been interpreted to not grant private plaintiffs the right to equitable relief, § 1964 (c) should be equally limited. That comparison is flawed.

There is no question but that RICO § 1964(c), by itself, does not address the question of whether equitable relief may be awarded to private plaintiffs. But, as discussed *supra*, pp. 8-10, when subsection (c) is read in conjunction with § 1964(a), the language of the two

---

[3] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United State district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c), as enacted (1970).

[4] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15, as enacted (1970).

linked provisions plainly authorizes injunctive relief in private lawsuits. The Clayton Act reaches the same result by a different route.

Although § 4 of the Clayton Act does not permit private equitable relief, another section of the Act, § 16, does. At the time of RICO's enactment, § 16 provided that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws.... 15 U.S.C. § 26 (1970).

Similarly, the government is authorized to seek equitable relief in another self-contained Clayton Act provision, § 15, which read as follows at the time of RICO's enactment:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. 15 U.S.C. § 25 (1970).

In short, the Clayton Act authorizes governmental and private equitable relief in two separate statutory provisions, § 15 and § 16, with each separate section

granting equitable rights and expressly identifying the parties that may enforce those rights. RICO covers the same ground in a different format. It authorizes the district courts to order equitable relief in the opening provision of § 1964, subsection (a), and then identifies the parties who may sue for that relief in the two following subsections, (b) and (c), which deal separately with the government and private parties. While structurally different, both enactments reach the identical result: each authorizes all plaintiffs, private and governmental, to sue for injunctive relief.

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties

Should the district court's nationwide injunction be overturned, the inevitable result would be a multiplicity of costly, inefficient lawsuits, jurisdiction by jurisdiction, with repetitive challenges to the same illegal conduct by the same plaintiffs against the same defendants. As noted by the district court, without a nationwide injunction defendants would legally be able to cross state lines to avoid restraints entered against them in one jurisdiction while continuing to engage in the identical illegal conduct at different clinics in other jurisdictions. *See Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *52. A nationwide injunction is therefore necessary to effectively deter illegal nationwide plans to foment violence against health clinics, and to avoid wasting limited judicial resources by requiring plaintiffs to engage in the same litigation against the same defendants over and over again.

II. THE USE OF FORCE, VIOLENCE OR FEAR TO PREVENT A BUSINESS FROM EXERCISING CONTROL OVER ITS INTANGIBLE PROPERTY RIGHTS IS EXTORTION UNDER THE HOBBS ACT

A. Hobbs Act "Property" Includes Intangible Things of Value and the Right to Use and Control Them

The property protected by the Hobbs Act has never been confined to physical assets; it has always "include[d], in a broad sense, any valuable right considered as a source or element of wealth." *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969). Every Circuit which has addressed the issue has adopted this meaning.[5] As a result, over the years numerous intangible "valuable rights" have been found to be covered by the Act. *See, e.g., United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 415 U.S. 1024 (1986) (right to make personal and business

---

[5] *See, e.g., United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *United States v. Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989); *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976).

decisions about the purchase of life insurance); *Hathaway*, 534 F.2d at 395 (right to procure a no-bid contract); *Tropiano*, 418 F.2d at 1076 (right to solicit business).

The concept of a right having economic worth separates intangible property from other intangible values, such as civil rights or liberty interests whose worth is not measured in economic or financial terms. *Compare McNally v. United States*, 483 U.S. 350, 359 (1987) (holding that the right to "good government" is not property under the mail fraud statute) *with Carpenter v. United States*, 484 U.S. 19, 25 (1987) (holding that confidential business information is property under the mail fraud statute). *See generally G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 256-57 (S.D.N.Y. 2001) (the First Amendment right to petition the government is not property that can be extorted because there is no direct nexus between petitioning the government and increasing personal wealth).

Just like tangible assets, valuable intangible property is protected by the Hobbs Act because the owner's control over these intangible rights enables her to make business decisions about their use free from outside influence. "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

When a property owner loses these rights, she loses her property. "[T]he 'property' of which the victim is deprived need not be tangible, but may be no more than the right to make his business decisions free of threats and coercion." *See Lewis*, 797 F.2d at 364.

"There can be no conception of property aside from its control and use . . . If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." 73 C.J.S. § 5 at 170 (1983).

The same indicia of valuable intangible property -- economic worth and the right of use and control -- defined the contours of the property covered by New York's extortion statute, the Penal Law of 1909, on which the Hobbs Act was based. *See Evans v. United States*, 504 U.S. 255, 261 n.9 (1992). Well before Congress passed the Hobbs Act in 1946, New York courts had held that property protected by the Penal Law included "every species of valuable right and interest," *People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698 (N.Y. App. Div. 1911), including the right to "free use, enjoyment, and disposal of all the owner's acquisitions, without any control or diminution, save only by the laws of the land." *People v. Barondess*, 16 N.Y.S. 436, 443-44 (N.Y. Sup. Ct. 1891), *dissenting opinion adopted on appeal*, 31 N.E. 240 (N.Y. 1892). Relying on *Short* and *Barondness*, the New York Court of Appeals applied these principles to a modern extortion case in *People v. Spatarella*, 313 N.E.2d 38 (N.Y. 1974), holding that business generated from a particular source is property that can be extorted. 313 N.E.2d at 39-40.

Thus, it has long been settled that the Hobbs Act's concept of property includes all intangible rights having present or potential economic value which the owner is empowered to control and use. This definition encompasses the right of the plaintiff health clinics to provide reproductive health care services to their female patients, as well as the patients' contractual rights with the clinics. The right to provide or receive medical

services is unquestionably a "valuable right considered as a source or element of wealth." *Tropiano*, 418 F.2d at 1075. Indeed, two Courts of Appeal in addition to the Seventh Circuit have specifically held that the right of a women's health clinic to provide reproductive health care services to its patients is Hobbs Act property. *See Arena*, 180 F.3d at 392; *McMonagle*, 868 F.2d at 1350. Those decisions are correct and should be upheld.

B. An Extortionist "Obtains" a Victim's Intangible Property Rights When He Prevents the Victim From Using or Exercising Control Over Those Rights

Preventing a property owner from using or exercising control over her property has the practical effect of taking the property from her.

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use.

Spann v. City of Dallas, 235 S.W. 513, 514-15 (Tex. 1921).

By parity of reasoning, the transfer to an extortionist of control over the right to use, enjoy and dispose of property does not require the extortionist to obtain physical possession of the property from the victim. On the contrary, a holding that would require a transfer of physical assets from the victim to the extortionist would excise intangible property rights from

the coverage of the Hobbs Act. For this reason, the Courts of Appeal have uniformly interpreted the term "obtaining" to mean any act or threat of force or violence that prevents a victim from using or exercising control over her intangible property rights. *See* fn. 4, *supra.*

An extortionist who uses violence to effect a wrongful transfer to himself of control over his victim's right to conduct her business as she sees fit has obtained the precise property that he set out to take. *See, e.g., Arena*, 180 F.3d at 394; *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.), *cert. denied,* 516 U.S. 945 (1995); *Santoni*, 585 F.2d at 673. Nothing more could be – or need be – obtained by the extortionist to effectuate his illegal scheme.

This point is illustrated by the decision in *United States v. Green*, 350 U.S. 415 (1956), where a union official used threats of violence to try to force an employer to pay wages for fictitious work. *Id.* at 417-18. The district court ruled that no Hobbs Act violation had occurred because neither the official nor the union was to have received money from the employer. *Id.* at 418 n.2. This Court reversed, holding that "extortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." What the extortionist has wrongfully obtained is the power to control the victim's property. *Id.* at 420. *See also Arena*, 180 F.3d at 394 (an extortionist obtains property when he forces a property owner to abandon the property, because the extortionist then controls the property's fate).

The same is true in this case. Defendants wrongfully gained control over the clinics' ability to provide medical services (and their patients' right to receive them) by using all kinds of violent tactics that either kept patients away or physically destroyed the clinics' property. *See NOW, Inc. v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001) (listing examples of the violent tactics employed by defendants). When they wrongfully obtained control over the health clinics' businesses, the defendants acted no differently than the corrupt officials and organized crime figures who wrongfully obtain the property of legitimate businesses by gaining control over their decision-making processes. *See, e.g., Stephens*, 964 F.2d at 433 n.20; *Zemek*, 634 F.2d at 1174; *Santoni*, 585 F.2d at 672-73; *Tropiano*, 418 F.2d at 1075-76.

C. Defendants' Liability will not Convert Constitutionally Protected Acts of Peaceful Civil Disobedience into Illegal Extortion

Defendants contend that if this Court upholds the judgments against them, "Hobbs Act offenses could be pursued against social protesters of all stripes, including those protesting for civil rights, environmental causes, or animal rights." Scheidler Brief at 35. Defendants err by equating their illegal use of force and violence with peaceful social protest. Constitutional protection has never been afforded to acts of force or violence even when they are intermixed with lawful protest activity. *See Claiborne Hardware*, 458 U.S. at 916. To violate the Hobbs Act, an extortionist must exceed constitutional boundaries by employing "actual or threatened force, violence or fear," as defendants did here. The Hobbs Act would not be implicated if any social protester were to

obtain "property from another" through constitutionally protected means.

Defendants also assert incorrectly that Congress did not intend the Hobbs Act to reach political protestors. Scheidler Brief at 5 n.23. The Eighth Circuit rejected this exact argument in *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973). There, a member of the Congress for Racial Equality was convicted of violating the Hobbs Act; on appeal, he argued that the Act was not intended to apply to militant civil rights activity. *Id.* at 193. Affirming the conviction, the court held that the Hobbs Act prohibits all forms of extortion, no matter the identity or cause of the perpetrator.

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion is extortion, whether or not the perpetrator has a union card. It covers whoever in any way or decree interferes with interstate foreign commerce by robbery or extortion.

Id. (quoting 89 Cong. Rec. 3217 (1943)).

Defendants' argument boils down to a plea that "motive" should determine whether one is subject to Hobbs Act liability, *i.e.*, that legitimate ends may justify vile means. That misguided concept has never been part of United States law for good reason. As the Seventh Circuit cautioned in an earlier opinion: "If a religious, moral, or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal

damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design." *See United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971).

Offensive and even coercive speech, on the other hand, is constitutionally protected "'so long as the [protester's] means are peaceful.'" *Claiborne Hardware*, 458 U.S. at 911, *quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Here, judgment was rendered only against defendants' violent means. Having chosen violence, defendants cannot now avoid the legal consequences by cloaking themselves in the mantle of peaceful social protest.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

Of Counsel
BONNIE J. CAMPBELL
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE R. KUCIK
Counsel of Record
J. MARCUS MEEKS
BONNIE L. KANE
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6084

September 17, 2002

APPENDIX A

STATEMENTS OF INTEREST

The Religious Coalition for Reproductive Choice, founded in 1973 by clergy and laity, is a non-partisan, non-profit education and advocacy organization of national groups and caucuses from major denominations including the Episcopal Church, Presbyterian Church (USA), United Church of Christ, United Methodist Church, Unitarian Universalist Association, and Reform and Conservative Judaism. Each member group of the Coalition has an official statement regarding reproductive choice that has been adopted by its governing body. Although the membership has diverse views about abortion rights, all agree that decisions about family, including whether and when to have children, are matters of individual conscience that must be made free of coercion and violence of any kind.

Disciples for Choice is an organization of members of the Christian Church (Disciples of Christ) and friends of the cause of reproductive choice. The stance of responsible freedom is supported historically by General Assembly Resolutions #24 (San Antonio, 1975), which read in part: "Therefore be it resolved that the General Assembly... [r]espect[s] differences in religious belief concerning abortion and oppose[s] in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans...."

Americans for Religious Liberty (ARL) is a non-profit public interest educational organization dedicated to defending religious liberty, freedom of conscience, and First Amendment rights. ARL has participated as an amicus curiae in cases before the Supreme Court and other courts where these concerns have been implicated.

The American Humanist Association (AHA), founded in 1941, has members and affiliates throughout the United States. The AHA affirms the right to privacy and the right of every woman to freedom of conscience and freedom of choice in dealing with problem pregnancies. The AHA has participated as an amicus curiae in cases involving freedom of conscience and religious liberty concerns.

The National Council of Jewish Women, Inc. *(NCJW)* is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has members in over 500 communities nationwide. Given NCJW's National Priorities, which state, "We endorse and resolve to work for the protection of every female's right to reproductive choice, including safe and legal abortion, and the elimination of obstacles that limit reproductive freedom," NCJW joins this brief.

United Church of Christ Justice and Witness Ministries, one of four Covenanted Ministries in the United Church of Christ, helps local congregations and all settings of the church to respond to God's commandments to do justice, seek peace, and effect change for a better world. The

work of Justice and Witness Ministries is guided by the pronouncements and resolutions approved by the General Synod of the United Church of Christ.

Lutheran Women's Caucus comprises women of the Evangelical Lutheran Church of America and Lutheran Church-Missouri Synod. The Caucus adopted a statement at its 1990 convocation gathering urging compassionate support for women with an unintended pregnancy and an end to harsh judgments against women who have abortions.

The Women's Rabbinic Network of the Central Conference of American Rabbis comprises more than 200 female Reform Movement rabbis and rabbinical students. The 20 year-old Network is an official arm of the Central Conference of American Rabbis (CCAR), the rabbinic organization of the Reform Movement in the United States.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. Most relevant to the case at bar are the Association's resolutions specifically supporting the fundamental right of individual choice in reproductive matters and the right of a female to have an abortion at her own request upon medical/social consultation of her own choosing.

Nos. 01-1118, 01-1119

In the Supreme Court of the United States

SEP 17 2002

JOSEPH SCHEIDLER, ET AL., *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE, *Petitioner,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE STATES OF CALIFORNIA, NEW YORK, CONNECTICUT, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, WASHINGTON AND WEST VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

BILL LOCKYER,
Attorney General
MANUEL M. MEDEIROS
Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
MARY E. HACKENBRACHT
Senior Assistant Attorney General

HELEN G. ARENS*
Deputy Attorney General
California Department of Justice
300 South Spring Street,
Suite 500
Los Angeles, California 90013-1230
(213) 897-2607

ELIOT SPITZER,
Attorney General
CAITLIN J. HALLIGAN
Solicitor General
DANIEL J. CHEPAITIS
Assistant Solicitor General
State of New York
Office of the Attorney General
120 Broadway
New York, New York
10271-0332
(212) 416-8025

* *Counsel of Record*

(Additional Counsel Listed Inside Front Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Additional Counsel for *Amici Curiae*

RICHARD BLUMENTHAL
Attorney General
Of Connecticut
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5318

J. JOSEPH CURRAN, JR.
Attorney General
Of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

THOMAS F. REILLY
Attorney General
Of Massachusetts
1 Ashburton Place
Boston, MA 02108-1698
(617) 727-2200

MIKE MCGRATH
Attorney General
Of Montana
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General
Of Nevada
100 N. Carson Street
Carson City, NV 89701-4717
(775) 684-1100

CHRISTINE O. GREGOIRE
Attorney General
Of Washington
1125 Washington Street, SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

DARRELL V. MCGRAW, JR.
Attorney General
Of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

QUESTIONS PRESENTED

1. Whether a person's wrongful use of violence, force or fear to induce medical clinics and their staffs to cease providing services and patients to abandon contractual relationships with the clinics constitutes extortion under the Hobbs Act, 18 U.S.C. § 1951.

2. Whether private litigants may obtain permanent injunctive relief in a Racketeer Influenced and Corrupt Organizations Act (RICO) civil action under 18 U.S.C. § 1964(c).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Statement of Interest of *Amici Curiae*	1
Summary of Argument	1
Argument	2
I. Petitioners Committed Hobbs Act Extortion...	2
A. Petitioners Were Properly Found Liable For "Obtaining Property" As Defined In The Hobbs Act	3
B. Mere Trespassory Interferences With Property Rights And Protest Activities Do Not Amount To Extortion	7
1. Mere Acts Of Trespass Or Violence Do Not Constitute Extortion	8
2. The Hobbs Act Cannot Be Applied To Chill Protest Activities	10
C. The New York Antecedents To The Hobbs Act Support Its Application To Petitioners' Conduct	12
1. The Term "Property," As Used In The New York Antecedents, Was Read Broadly, Not Narrowly	13
2. The Prohibition On Coercion Under New York Law Does Not Aid Petitioners	16

TABLE OF CONTENTS – Continued

	Page
D. The Hobbs Act Cannot Be Applied To Misuses Of Governmental Regulatory Power, Unless Government Officials Seek Personal Gain	18
II. RICO Authorizes Permanent Injunctions In Private RICO Actions	19
A. Private Injunctions Are Available Under A Plain Reading Of 18 U.S.C. § 1964	19
B. The Availability Of Private Injunctions Serves The Purposes Of RICO.	22
C. The Legislative History Of § 1964 Is Consistent With Recognition Of Private Injunctive Relief.	24
D. Comparison With The Antitrust Laws Does Not Support The Contention That Congress Intended To Foreclose Injunctions In Private RICO Actions.	26
E. Public Policy Considerations Support The Availability Of Injunctions In Private Civil RICO Actions	28
Conclusion	30

TABLE OF AUTHORITIES

Page

CASES:

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 25, 26

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 122 S.Ct. 941 (2002) 25

California v. American Stores Co., 495 U.S. 271 (1990) 23, 26

Carpenter v. United States, 484 U.S. 19 (1987) 6, 7

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 25

Cleveland v. United States, 531 U.S. 12 (2000) 18, 19

Consumer Product Safety Comm'n v GTE Sylvania Inc., 447 U.S. 102 (1980) 19

Crane v. Commissioner, 331 U.S. 1 (1947) 4

Debartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988) 10

Enmons v. United States, 410 U.S. 396 (1973) 7

Equitable Life Assurance Soc'y v. Brennan, 148 N.Y. 661 (1896) 5

Evans v. United States, 504 U.S. 255 (1992) 12

Goldblatt v. Hempstead, 369 U.S. 590 (1962) 4

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4

McNally v. United States, 483 U.S. 350 (1987) 6, 7

Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) 26, 27

TABLE OF AUTHORITIES – Continued

Page

Mugler v. Kansas, 123 U.S. 623 (1887) 4

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 11, 12

National Organization for Women v. Scheidler, 510 U.S. 249 (1994) 25

National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994) 29

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 7

People ex rel. Short v. Warden, 130 N.Y.S. 698 (N.Y. App. Div. 1911) 13

People ex rel. United States Aluminium Printing Plate Co. v. Knight, 174 N.Y. 475 (1903) 7

People v. Adelstein, 195 N.Y.S. 2d 27 (N.Y. App. Div. 1959) 14, 17

People v. Ashworth, 222 N.Y.S. 24 (N.Y. App. Div. 1927) 15

People v. Barondess, 16 N.Y.S. 436 (N.Y. Sup. Ct. 1891), *rev'd*, 31 N.E. 240 (N.Y. Ct. App. 1892) 13

People v. Barondess, 31 N.E. 240 (N.Y. Ct. App. 1892) 13

People v. Cadman, 57 Cal. 562 (1881) 13

People v. Cuddihy, 271 N.Y.S. 450 (N.Y. Sup. Ct. 1934), *aff'd*, 277 N.Y.S. 960 (N.Y. App. Div. 1935) 13, 17

People v. Ginsberg, 262 N.Y. 556 (1933) 16, 17

People v. Kaplan, 240 A.D. 72 (N.Y. App. Div.), *aff'd*, 264 N.Y. 675 (1934) 16, 17

TABLE OF AUTHORITIES – Continued

Page

People v. Learman, 28 N.Y.S. 2d 360 (N.Y. App. Div. 1941) 15

People v. Scotti, 266 N.Y. 480 (1934) 16, 17

People v. Spatarella, 34 N.Y. 2d 157 (1974) 14

People v. Squillante, 185 N.Y.S. 2d 357 (N.Y. Spec. Term 1959), *reviewed by*, 195 N.Y.S. 2d 96 (N.Y. App. Div. 1959) 14, 17

People v. Weil, 273 N.Y. 653 (1937) 17

People v. Weisbard, 248 N.Y.S. 399 (City Mag. Ct. 1931) 15

Rotella v. Wood, 528 U.S. 549 (2000) 22

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 6, 7

Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985) 23

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) 25

Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877) 4

United States v. Antico, 275 F.3d 245 (3d Cir. 2001) 18

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) 4

United States v. Dinwiddie, 76 F.3d 913 (1996) 29

United States v. Turkette, 452 U.S. 576 (1981) 19

United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) 5

Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A., 944 F.2d 870 (Fed. Cir. 1991) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Cal. Corp. Code § 1800(b)(4) 24

Clayton Act § 16, 38 Stat. 737 26

Commissioners of the Code, Proposed Penal Code of the State of New York (1865):

§ 280 14

§ 584 14

§ 613 ..... 12, 14

Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2000)) 28, 29

Hobbs Anti-Racketeering Act:

18 U.S.C. § 1951 ..... *passim*

N.Y. Bus. Corp. L. §§ 1101-1103 24

N.Y. Penal Law:

§ 530 (1909) 16

§ 552 (1881) 12, 15

§ 850 (1909) 12, 15, 16

§ 853 (1930) 17

§ 1290 (1909) 15

§ 2120 (1881) 15

Racketeer Influenced and Corrupt Organizations Act:

18 U.S.C. § 1962 ..... 19, 20, 22

18 U.S.C. § 1964 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Sherman Act:

§ 4 ..... 26, 27

§ 7 27

MISCELLANEOUS:

American Law Institute, *Model Penal Code* Art. 223.0(5) (1985) 6

California Senate Office of Research, *Crimes Against Reproductive Rights in California*, May 2001 (Revised January 2002) *available at* http://www.sen.ca.gov/sor/Reprocrimes.htm 29

H.R. Rep. No. 1549, 91st Cong. 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4407, 4434 24

Restatement (First) of Property § 13 (1936) 6

Roger A. Cunningham *et al.*, *The Law of Property* (West, 1984) 4

The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Senate Committee on Labor and Human Resources, 103d Cong. 10 (1993) 28

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The States of California, New York, Connecticut, Maryland, Massachusetts, Montana, Nevada, Washington and West Virginia, through their Attorneys General, respectfully submit this brief as *amici curiae* urging affirmance of the decision below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici states have a strong interest in maintaining adequate legal protections and remedies against activities intended to compel their citizens, by actual or threatened force, to cede protected property. *Amici* include states where health care clinics have received demands to shut down their businesses or cease providing certain services and have either been targets of violent activities by anti-abortion extremists or received threats of such activities.

Application of the Hobbs Act to petitioners' conduct as a predicate for a RICO verdict, as well as the availability of permanent injunctive relief, meaningfully supplements the legal remedies available to state law enforcement officers, while respecting the proper balance between federal and state criminal jurisdiction.

SUMMARY OF ARGUMENT

1. The jury's finding that petitioners committed Hobbs Act extortion is a permissible one: petitioners sought to induce fear of violence and other unlawful harm and to leverage that fear to obtain respondent clinics' submission to demands that they shut down or, at least, cease providing abortion services.

In particular, the extraordinary degree of ongoing control petitioners sought satisfies the Hobbs Act requirement of "obtaining property": a person can "obtain property" by obtaining an ongoing power of control over another's assets that is equivalent to that held by a lawful property

owner. While the Hobbs Act should be construed to avoid application to ordinary trespass, violent crimes, and protest activities, the "obtaining property" requirement does not, as petitioners suggest, have to be interpreted to exclude all instances in which a perpetrator seeks to obtain non-possessory control over an asset. Instead, a rigorous application of the elements of Hobbs Act extortion, as well as First Amendment protections, should preclude application of the Hobbs Act except in cases of truly extortionate conduct.

2. Section 1964 of RICO authorizes district courts to issue permanent injunctions in RICO actions brought by private litigants, as well as in proceedings brought by the Attorney General.

The plain language of section 1964 dictates this result. Subsection 1964(a) authorizes district courts to enjoin violations of section 1962, and it contains no restrictions on the litigants who may seek permanent injunctions. Neither subsection 1964(b) nor subsection 1964(c), which authorize the Attorney General and private litigants to seek particular remedies, address the availability of permanent injunctions. In short, section 1964 contains no limitation on the litigants who may seek permanent injunctions.

The availability of private injunctions serves RICO's purposes and is consistent with the legislative history of section 1964. Comparison of RICO with the antitrust laws does not indicate that Congress intended to foreclose injunctions in private RICO actions. Finally, public policy considerations support availability of injunctions.

ARGUMENT

I. PETITIONERS COMMITTED HOBBS ACT EXTORTION

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2).

Here, the jury found that petitioners had committed 21 acts of Hobbs Act extortion, as predicates for a RICO violation. The verdict is a permissible application of the Hobbs Act: petitioners sought to place clinics nationwide in fear of violence and other unlawful harm by engaging in and encouraging physical assaults, vandalism, and other uses of force, and threatening similar conduct in the future (wrongful use of actual and threatened force, violence and fear), with the objective of using that fear to gain the clinics' submission (the victim's consent) and thereby obtain ongoing control over business operations, services and contractual relationships (obtaining property).

A. Petitioners Were Properly Found Liable For "Obtaining Property" As Defined In The Hobbs Act.

Petitioners' central objection to the jury's finding of Hobbs Act violations is that their conduct does not constitute "obtaining property." *Amici* agree that application of the "obtaining property" requirement of the Hobbs Act outside the paradigmatic extortion case – an extortionist's demand for money or tangible assets – poses difficult questions. And, in many cases where intangible assets, and intangible interests in those assets, are at stake, it may be that a perpetrator has not "obtain[ed] property" for purposes of the Hobbs Act. But, because of the extraordinary degree of ongoing control that petitioners sought to obtain over respondents' assets – petitioners demanded that respondent clinics shut down (or at least cease providing a service that is central to their business) – this is an appropriate case for such a finding.[1] As the Second Circuit

[1] By "ongoing" control, *amici* mean a control that endures beyond a person's immediate physical exercise of dominion over a thing. *Amici* develop this point at greater length *infra*, Point I.B., in discussing why trespassers and protestors ordinarily cannot be prosecuted for extortion.

has held, where a perpetrator seeks to "regulat[e] the fate" of a valuable asset, the perpetrator can be found to have attempted to "obtain[ ] property." *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (internal quotation marks, citation and ellipses omitted). This result accords with basic property law principles.

Property includes "rights to control and dispose" of a thing, *Crane v. Commissioner*, 331 U.S. 1, 6 (1947); *see generally* U.S. Br. at 15-21, such as rights of possession, rights of exclusion, rights of disposition, rights of use, rights to enjoy fruits or profits, and rights of destruction, *see, e.g.*, Roger A. Cunningham *et al.*, *The Law of Property* § 1.2, at 7 (West, 1984).

Of particular relevance here, the law recognizes as property many interests that confer only a right to veto uses, without permitting the holder to direct affirmative uses.[2] An obvious example is a negative easement on land. The holder does not have any affirmative rights of use, but does hold a right to "restrain[ ] the owner from doing that with, and upon, his property which, but for the . . . covenant, he might lawfully have done." *Trustees of Columbia College v. Lynch*, 70 N.Y. 440, 447 (1877). Negative

[2] Of course, this argument has no applicability to a regulatory takings claim. Although the regulation of property may restrict permissible uses, because "the property owner necessarily expects the use of his property to be restricted . . . by . . . legitimate exercises of [the states'] police powers," such regulation ordinarily does not effect a taking of property within the meaning of the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *see, e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 592-96 (1962) (holding that ordinance effectively prohibiting continuation of pre-existing business was not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 410-11 (1915) (holding that ordinance prohibiting continuation of brick-making operation was not a taking); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (holding that prohibition upon use of building as a brewery was not a taking).

easements are merely illustrative of veto rights as an important category of property interests.[3]

Veto rights and other rights of control are "obtained" when a grantee obtains the claim to control that is the essence of the right: when an easement is transferred, the grantee obtains rights of control, for example, a right to cross land or demand that the servient landowner maintain a road, or, in the case of a negative easement, the right to veto disfavored uses of land; similarly, when shares in a business are transferred, the grantee obtains rights of control, such as voting rights or a right to demand a share of profits.

Here, if petitioners had purchased a negative easement prohibiting the use of the respondent's land or buildings for the performance of abortions, there could be no question that they had "obtain[ed] property."[4] The extra-legal power of control that petitioners in fact sought was not different from the power of control afforded by an easement in any relevant sense. To be sure, here, petitioners obtained no right that, like the rights afforded by an easement, could be enforced in court. But, of course, legal enforceability cannot be the test for whether an extortionist has "obtain[ed] property."[5]

[3] *See, e.g.*, *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 875 (Fed. Cir. 1991) (recognizing that a patentee, although he assigned "all substantial rights" in a patent, nonetheless retained a veto right on sublicensing) (emphasis omitted); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 630 (1961) (concluding that an easement holder, although having no possessory rights, had an "exclusive and perpetual property right to destroy" "the highest and best use of the servient land").

[4] *See, e.g.*, *Equitable Life Assurance Soc'y v. Brennan*, 148 N.Y. 661, 665-66 (1896) (involving covenant not to operate "any trade, business or employment which shall be dangerous or noxious or constitute a nuisance" on servient land).

[5] The extra-legal control that an extortionist obtains, unlike that of a lawful property right, is enforced by resort to (and recognized by his

(Continued on following page)

Petitioners counter that "obtaining property," as defined in the Hobbs Act, requires an "acquisition or transfer *of some item* of 'property' from the owner to someone else." Scheidler Br. at 14 (emphasis added; emphasis in original deleted). Petitioners' construction, however, leaves no room for most ordinary usages of the phrase "obtaining property," which involve no transfer of possession of any thing. Petitioners' implicit use of the "vulgar and untechnical sense" of property as a "thing," *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (internal quotation marks and citations omitted), is indefensibly narrow. Only when "property" is "employed in a more accurate sense to denote the group of rights" a person may have in a "thing," *id.* (internal quotation marks and citations omitted), can one account for most ordinary usages of the phrase "obtaining property."[6]

Petitioners also argue that the interests at stake here are not covered by the Hobbs Act because they constitute mere "intangible rights," and they argue that, in *McNally v. United States*, 483 U.S. 350 (1987), this Court held that such rights were not property. *See* Scheidler Br. at 16-17; OR Br. at 40-42. *McNally*, though, merely held, for purposes of mail fraud, that the "intangible right of the citizenry to good government" does not constitute property. *Id.* at 356. As this Court subsequently explained in *Carpenter v. United States*, "*McNally* did not limit the scope of

victim because of) the harm that the extortionist threatens, *see* 18 U.S.C. § 1951(b)(2) (defining as extortion the obtaining of property with the victim's consent, induced by fear), rather than by legal sanctions.

[6] Legal commentary holds that a transfer of "property" requires only the transfer of an *interest* in a thing. Thus, the First Restatement of Property defines "transfer" of property as "the extinguishment of . . . interests [in a thing] existing in one person and the creation of such interests in another person." *Restatement (First) of Property* § 13 (1936). Likewise, the Model Penal Code provides that, "in relation to property," "'obtain' means . . . to bring about a transfer . . . of a legal interest in the property, whether to the obtainer or another." American Law Institute, *Model Penal Code* Art. 223.0(5) (1985).

[mail fraud] to tangible as distinguished from intangible property rights." 484 U.S. 19, 25 (1987).[7] At most, the Court explained, *McNally* recognized that interests such as a citizen's asserted "rights to honest and impartial government" are "too ethereal" to constitute "property." *Id.*

The interests at issue in this case cannot be dismissed as "too ethereal" to constitute property. Petitioners sought ongoing control over interests that have traditionally been protected as property, in particular, the use of real estate, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (recognizing that a use restriction on real estate may constitute a taking of property); and a business' interest in continued operations, *see People ex rel. United States Aluminium Printing Plate Co. v. Knight*, 174 N.Y. 475, 484 (1903) (holding that a business' "right to exist and carry on its business" is "intangible property").

B. Mere Trespassory Interferences With Property Rights And Protest Activities Do Not Amount To Extortion.

Petitioners and their supporting *amici* contend that respondents' position would "turn the Hobbs Act into a device for federalizing such traditional state offenses as trespass, vandalism, and obstruction of public passage," OR Br. at 48; *see also* Scheidler Br. at 33, and would chill legitimate protest activities. *See* Scheidler Br. at 35; OR Br. at 46-47.

Amici share the concern that the Hobbs Act not be extended beyond its proper reach to cover such activities. But the answer is not to limit the definition of "obtaining

[7] The proposition that property rights "extend[ ] beyond land and tangible goods" is well-established. *Ruckelshaus*, 467 U.S. at 1003. The *Carpenter* Court expressly relied on that proposition in holding that a newspaper's interest in the pre-publication confidentiality of an advice column was a "property right." 484 U.S. at 25.

property" to obtaining physical possession of a thing. The answer is to recognize and apply a number of limitations that follow naturally from the text of the Hobbs Act and from the protections of the First Amendment.[8]

1. Mere Acts Of Trespass Or Violence Do Not Constitute Extortion.

Trespass or violence that interferes with the enjoyment of property, without more, does not meet the requirements of the Hobbs Act. First, the mere trespasser does not "obtain[ ]" property. To "obtain[ ] property," one must gain that which property rights confer. Unlike the mere trespasser, the extortionist must gain a power to control that is analogous to legally enforceable property rights – that is, a power of control that, like an enforceable property right, endures beyond a person's immediate physical exercise of dominion over a thing and permits the extortionist to dictate significant decisions about the disposal of an asset.

The mere trespasser gains no ongoing control over the landowner's property; instead, the trespasser gains a temporary enjoyment of the property that lasts only as long as the trespasser remains on the land and resists removal. This holds true even if the trespasser uses force: at most, the force may have an immediate impact (physical dominion over or destruction or harm to a thing), but it does not confer any ongoing control over the landowner's property. Just as an individual who obtains permission to

[8] By virtue of this Court's decision in *Enmons v. United States*, the Hobbs Act poses no threat to concerted activity by labor unions and their members, so long as they seek legitimate labor objectives. *See* 410 U.S. 396, 400 (1973) (holding that Hobbs Act prohibition on "wrongful" use of actual or threatened force, violence or fear does not apply to union agents who seek "legitimate union objectives, such as higher wages in return for genuine services"). This case in no way questions the legitimacy or impact of *Enmons* in the labor context.

cross land on isolated instances does not have an easement, the trespasser who, on isolated occasions, interferes with a property owner's use of an asset cannot credibly be alleged to have "obtain[ed]" the extra-legal equivalent of a property right.

Petitioners, by comparison, do not fall within this safe harbor because they sought a power of ongoing control and the control they sought – veto power over respondents' performance of abortions – is effectively indistinguishable from the power of control that they would have obtained had they purchased an easement on respondents' land and buildings.

Second, a trespasser, as distinguished from an extortionist, also does not accomplish anything "with [the victim's] consent, induced by wrongful use of actual or threatened force, violence, or fear." This element of a Hobbs Act violation is appropriately understood as requiring that the extortionist use fear of future unlawful harm to gain the submission (unwilling consent) of the victim, thereby gaining the ability to exercise a proprietary claim with a reasonable expectation that it will not be interfered with by the victim. Because the mere trespasser interferes with the owner's enjoyment of property rights directly, by physically occupying buildings or land, not by putting the victim in fear and gaining the victim's submission, he does not meet this requirement.[9]

The means petitioners employed to achieve their objectives – use of threats of force to enforce a claim to ongoing control over the clinics – distinguish their conduct from mere trespass, violence, and vandalism, and make

[9] This is so even if the trespasser engages in violence in furtherance of the trespass: the trespasser's power to occupy a building lasts only so long as the trespasser is present and physically resists removal; the violent trespasser ordinarily does not seek to induce the target's fear and submission with the objective of being able to exercise control after he departs.

appropriate a finding that they sought to obtain property "with [the victim's] consent, induced by wrongful use of actual or threatened force, violence, or fear." They engaged in trespass and they used force. But, more than that, they sought to leverage fear of future force to obtain the clinics' submission, and thus, ultimately, obtain proprietary control over clinics' businesses.

2. The Hobbs Act Cannot Be Applied To Chill Protest Activities.

Contrary to petitioners' arguments, the Hobbs Act cannot be applied to protest activities, both because such actions do not satisfy the elements of the Hobbs Act and because the First Amendment protects this conduct.

a. The Hobbs Act certainly does not reach protestors who "depend . . . on the persuasive force of the idea" that they are communicating, *Debartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 580 (1988) (internal citation and quotation marks omitted), to apply pressure to their target through public disapproval or embarrassment. *Cf.* Br. of Amicus PETA at 2 (noting that PETA supporters engage in protests "to call public attention" to objectionable practices).

Such protestors do not "obtain[ ] property" because property rights provide no guarantee against losses caused by public disapproval. *See Debartolo*, 485 U.S. at 580 (holding that a business that responds to a boycott is "doing no more than what its customers honestly want it to do"). Nor does the application of pressure through protest amount to "induc[ing]" another's "consent . . . by wrongful use of actual or threatened force, violence, or fear." Public opinion is not force or violence. And, pressuring someone to change their conduct to conform to the expectations of others, by threatening public disapproval, is not a "wrongful" use of "fear." *See id.* (holding that customers who boycott a business in response to the message of protestors are responding to "mere

persuasion," and the pressure applied by changes in customer conduct is an ordinary component of business).

The Hobbs Act should be inapplicable even in the vast majority of instances in which protest activities are marred by peripheral violence (*e.g.*, picket line altercations) or disruptive activities (*e.g.*, occupation of buildings). The Hobbs Act requires that the perpetrator "obtain[ ] property" and do so by a particular means: "with [the victim's] consent, induced by wrongful use of actual or threatened force, violence, or fear." This language indicates that a nexus between the extortionist's objective and means is required, a nexus that is typically not present in such cases. Peripheral violence and disruptive activities occurring in connection with a protest are generally not calculated to and directly intended to obtain ongoing control akin to a property right.

Petitioners' conduct, by comparison to legitimate protest activities, is properly actionable as a Hobbs Act violation. Rather than seeking change through influencing public opinion, and relying upon the pressure that accompanies public disapproval, petitioners attempted to place the clinics, their staffs, and their patients in fear of future force and violence. And they sought, by means of such fear, to obtain the submission of the clinics and, thereby, an ongoing veto power over the performance of abortions. Petitioners' conduct falls within the ambit of the Hobbs Act; ordinary protest activities do not.

b. Not only are protest activities ordinarily outside the scope of the Hobbs Act itself, but the First Amendment independently forecloses its application to attempts by protestors, through speech, to pressure a target to conform his conduct to public opinion. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 & 915 (1982) (holding that the First Amendment bars liability against boycott organizers, who sought to achieve their objectives by "persuasive rhetoric . . . and a host of voluntary decisions by free citizens"). Moreover, even where violence and other non-protected activity occurs, for a particular protestor to be held liable, the First Amendment demands proof that

the protestor "specifically intend[s] to accomplish [his objectives] by resort to violence" or other unprotected activity, rather than through speech. *Id.* at 919 (internal citations and quotation marks omitted).

In this case, the Seventh Circuit reviewed the record and, while recognizing that petitioners did engage in some protected conduct, concluded that there was ample evidence that petitioners intended to accomplish their objectives by resort to force and that the jury verdict was based on petitioners' unprotected use of force to achieve their objectives. 267 F.3d 687, 700-705 (7th Cir. 2001). Consequently, the Court determined that the verdict did not offend First Amendment principles. *Id.* That determination is not before this Court, and First Amendment protections remain an important check on the scope of the Hobbs Act in cases where protestors do not intend to accomplish their objectives by resort to force.

C. The New York Antecedents To The Hobbs Act Support Its Application To Petitioners' Conduct.

Petitioners contend that the meaning of the phrase "obtaining property," as used in the New York antecedents of the Hobbs Act – the 1865 "Field Code"[10] and the Penal Laws adopted by New York in 1881 and 1909 – precludes application of the Hobbs Act to their conduct. *See* Scheidler Br. at 18-24. These early New York Codes, like the Hobbs Act, prohibited specified uses of threats to "obtain[ ] property,"[11] and they are recognized as a model for the Hobbs Act. *See Evans v. United States*, 504 U.S.

[10] Commissioners of the Code, *Proposed Model Penal Code of the State of New York* (1865) ("Field Code").

[11] *See* Field Code § 613; N.Y. Penal Law § 552 (1881); N.Y. Penal Law § 850 (1909).

255, 261-62 n.9 (1992). But, petitioners' characterization of them as exceedingly narrow is baseless.

1. The Term "Property," As Used In The New York Antecedents, Was Read Broadly, Not Narrowly.

New York courts applying the state law antecedents to the Hobbs Act have set forth a broad understanding of the type of "property" that may be the subject of extortion. *See, e.g., People v. Barondess*, 31 N.E. 240, 241 (N.Y. Ct. App. 1892) (adopting the dissenting opinion of Daniels, J., in *People v. Barondess*, 16 N.Y.S. 436, 444 (N.Y. Sup. Ct. 1891), which concluded that, for purposes of extortion under the New York Penal Law, "property" was intended "in its broad and unrestricted sense," and, consequently, injury to a business amounts to injury to "property"); *People v. Cuddihy*, 271 N.Y.S. 450, 453 (N.Y. Sup. Ct. 1934) (holding that, for purposes of extortion, "property" includes "the right to labor"), *aff'd*, 277 N.Y.S. 960 (N.Y. App. Div. 1935); *People ex rel. Short v. Warden*, 130 N.Y.S. 698, 700 (N.Y. App. Div. 1911) (holding that, for purposes of extortion, "'property' . . . is intended to embrace every species of valuable right and interest," and, consequently, "labor constitutes property") *aff'd*, 206 N.Y. 632 (1912).[12]

In the absence of any narrowing definition of "property" in codes or caselaw dealing with *extortion*,[13]

[12] Confirming this broad interpretation of "property," the California Supreme Court, applying the Field Code formulation of extortion, held that a litigant's intangible right to appeal "is property" and that "a threat made for the purpose of inducing an appellant to dismiss an appeal is a threat made with intent to extort property from another." *People v. Cadman*, 57 Cal. 562, 564 (1881).

[13] As petitioners note, *Barondess*, *Cuddihy*, and *Short* address the meaning of "property" for purposes of defining harms to property that satisfy the "threat" element of extortion rather than in defining the "obtaining property" requirement, and as purported evidence that

(Continued on following page)

petitioners rely on the definitions of property used in the New York antecedents to define the crimes of *larceny* and *robbery*. *See* Scheidler Br. at 19-20 nn.13-14. Comparison to these larceny and robbery provisions, however, undermines, rather than supports, petitioners' position.

The commentary to the Field Code warns that the crimes of robbery, larceny and extortion "require to be . . . distinguished." Field Code § 584 cmt. And, in its operative provisions, the Field Code draws a clear distinction between the kinds of property that are the subject of extortion and the property that may be the subject of robbery and larceny. The Field Code provides that extortion extends to the obtaining of "property." Field Code § 613. By contrast, the Field Code explicitly limits the property interests that may be the subject of larceny or burglary to "*personal* property." *Id.* §§ 280 (robbery), 584 (larceny) (emphasis added). This explicit statutory distinction has dual significance. First, when the Commissioners of the Code intended to limit the forms of property that were to be the subject of a crime, they knew how, but they did not do so in defining extortion. Second, petitioners contend that case law cited in the Field Code as defining the limits of the property interests that may be the subject of *larceny* also define the limits of property for purposes of the crime of extortion. *See* Scheidler Br. at 19-20, 25 & nn.13-14.

"property" had a narrower meaning for the latter purpose they cite *People v. Squillante*, 185 N.Y.S.2d 357 (N.Y. Spec. Term 1959), *reviewed by*, 195 N.Y.S.2d 96 (N.Y. App. Div. 1959) (dismissing indictment on different grounds), *and reviewed sub nom People v. Adelstein*, 195 N.Y.S.2d 27 (N.Y. App. Div. 1959) (same). *See* Scheidler Br. at 22-23 n.16. For a full answer to this argument, *see* U.S. Br. at 18 (noting absence of evidence of such inconsistent use and further noting that the proposition for which petitioners cite *Squillante* was rejected by New York's highest court in *People v. Spatarella*, 34 N.Y.2d 157, 162 (1974) (holding that "[w]e are not disposed to construe the term ['property'] differently in defining the sort of property that can be demanded" than in "defining the kind of property which can be threatened")).

But, the Field Code, establishing that extortion applies to all "property" while larceny applies only to "personal property," renders the analogy inapt.

Petitioners draw similarly misplaced conclusions from the Penal Laws adopted by New York in 1881 and 1909. As with the Field Code, those codes explicitly distinguish between the property that may be the subject of extortion and the property that may be the subject of larceny or robbery. Compare N.Y. Penal Code § 552 (1881) (providing that extortion involves the obtaining of "property"); *id.* § 850 (1909) (same), with N.Y. Penal Code § 1290 (1909) (defining the property protected more narrowly for purposes of larceny); *id.* § 2120 (1909) (same, for purposes of robbery). As in the Field Code, the Legislature indicated no limitation on the "property" protected by the prohibition on extortion. And, again, these statutory distinctions also undermine the probative value of caselaw interpreting Penal Law provisions relating to robbery or larceny. *Cf.* Scheidler Br. at 25, 26 (citing *People v. Weisbard*, 248 N.Y.S. 399 (City Mag. Ct. 1931) (interpretation of larceny provisions); *People v. Ashwo[illegible]* 222 N.Y.S. 24 (N.Y. App. Div. 1927) (same).[14]

[14] Petitioners also cite *People v. Learman*, 28 N.Y.S.2d 360 (N.Y. App. Div. 1941), in support of the argument that rights that are not transferable cannot be "property." But, the holding of *Learman* was merely that a driver's license is a "privilege which might be denied" its holder, and so could not be considered property. *Id.* at 365 (internal quotation marks and citation omitted). In this context, the court's further observation that the non-assignability of a driver's license confirms that it is not property suggests only that non-assignability is an important factor in determining whether a *license* is property, rather than a mere "privilege." It does not follow that non-alienable rights (*e.g.*, non-alienable rights to a trust fund, personal easement rights, or rights to one's own body) can never be property.

2. The Prohibition On Coercion Under New York Law Does Not Aid Petitioners.

Petitioners suggest that the existence of the two different crimes of extortion and coercion – extortion applied to the use of threats to "obtain[] property," and coercion applied to the use of threats "to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing," N.Y. Penal Law § 850 (1909) (extortion); *id.* § 530 (coercion) – demonstrates a clear distinction in the law between "property" interests and "autonomy" interests. Scheidler Br. at 23-24; OR Br. at 37-38. According to petitioners, New York caselaw demonstrates that threats against business interests involved autonomy interests only and were exclusively prosecuted as coercion, rather than as extortion. *See* Scheidler Br. at 27-28 (citing *People v. Ginsberg*, 262 N.Y. 556 (1933); *People v. Scotti*, 266 N.Y. 480 (1934); *People v. Weil*, 273 N.Y. 653 (1937); *People v. Kaplan*, 240 A.D. 72 (N.Y. App. Div.), *aff'd*, 264 N.Y. 675 (1934)).

The relationship of criminal coercion to extortion is more complex than petitioners would have it, and does not suggest any clear line dividing "obtaining property" and restraining liberty. Although coercion may have a broader reach, there also necessarily is overlap between the property interests protected by prohibitions on extortion and liberty interests protected by prohibitions on coercion: indeed, one who commits extortion ordinarily also commits coercion.[15]

[15] The plain text of the prohibitions on extortion and coercion demonstrate that most, if not all, conduct that could support a charge of extortion also could be prosecuted as coercion: if a perpetrator compels a victim to cede property rights, he also necessarily will compel the victim "to do . . . an act which such other person has a legal right . . . to abstain from doing."

Given the overlap, a decision to prosecute conduct as coercion rather than extortion may simply reflect the exercise of prosecutorial leniency. *Ginsberg* and *Kaplan* are best understood in this light, rather than as illustrations of any allegedly narrow scope of the "obtaining property" requirement for extortion.[16] And even if a prosecutor's decision was based on a belief that the crime could not be prosecuted as extortion, that judgment might well have had nothing to do with any narrow understanding of what interests constitute property. Thus, in *Scotti* and *Weil*, other obvious legal deficiencies would have prevented the defendants' prosecution for extortion.[17]

[16] In *Ginsberg*, the defendants likely could have been prosecuted for extortion, even under petitioners' narrow view of the crime: defendants threatened to cause physical damage to the victim's store; their demand was that the victim join their trade association, which, presumably, included a demand that he pay fees. 262 N.Y. at 556. And, in *Kaplan*, members of one rival union faction were accused of using violence and other threats to compel another faction to dismiss lawsuits. 240 A.D. at 74-75. The reason the case was prosecuted as coercion rather than extortion clearly is *not* that compelling another to dismiss a civil action could not be prosecuted as extortion: the question whether a cause of action constituted "property" was irrelevant to the case, because the then-applicable Penal Law clearly provided that the use of threats to compel another to file voluntary dismissal papers in court constituted extortion. *See* N.Y. Penal Law § 853 (1930) (providing that extortion includes the use of threats to compel another to "make . . . any . . . instrument in writing affecting or intended to affect any cause of action or defense").

[17] In both cases, labor union officers were prosecuted for making threats in support of collective bargaining demands. *Scotti*, 266 N.Y. at 480; *Weil*, 273 N.Y. at 654. It was well-established at the time that union officers who made demands on employers could be prosecuted for extortion only if they sought *personal* financial gain, not if they sought legitimate labor objectives. This principle was derived from the requirement of an intent "to obtain that which in justice and equity the party is not entitled to receive." *Cuddihy*, *supra*, 271 N.Y.S. at 453; *accord Adelstein*, *supra*, 195 N.Y.S.2d at 28 (reviewing *Squillante*, *supra*, 185 N.Y.S.2d 357).

D. The Hobbs Act Cannot Be Applied To Misuses Of Governmental Regulatory Power, Unless Government Officials Seek Personal Gain.

Finally, *Amici* Alabama *et al.* (Alabama) argue that, unless the "obtaining property" element of the Hobbs Act is narrowly construed, government officials may be subject to charges of extortion for misconduct in connection with regulatory decisions. Br. of *Amici* Alabama et al. at 10-12. The premise underlying Alabama's concern appears to be that government officials, in regulating property, exercise control over private property, and that improper exercises of control will trigger a finding that the government official "obtained property." *Id.*

There is no such danger. To be sure, if a governmental official exercises governmental power to instill fear and thereby obtain some *personal* gain, the official may be guilty of Hobbs Act extortion. *See United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) (upholding Hobbs Act conviction of city official who utilized the threat of withheld licenses to obtain, *inter alia*, a partnership interest in and personal control over nude dancing establishments). But where an official merely implements regulatory controls, without seeking personal gain, he or she does not "obtain property," because the assertion of regulatory control over property does not confer a "property" interest upon the government actor.

Thus, in *Cleveland v. United States*, 531 U.S. 12 (2000), this Court addressed a claim that fraud by a private party in obtaining a license from a state deprives the state of "property." The Court held that it did not, concluding that a state's right of control over licenses is not a "property" right. *Id.* at 23. It reasoned that the state, in exercising its police powers to control licenses, is acting in its role as sovereign. *Id.* Significantly, it concluded that a sovereign's exercise of its police powers to control property does not implicate any "property" interest of the sovereign. *Id.* at 20-24.

Of course, Alabama's concern appears to be that officials who *misuse* regulatory power will be subject to allegations that they "obtained property" for purposes of the Hobbs Act. But nowhere does *Cleveland* suggest that even if the state had been wrongfully withholding a license from the defendant – *e.g.*, withholding the license in derogation of statutory requirements for its issuance – the state's interest would be converted to a property, as opposed to a regulatory, interest. On the contrary, the absence of a property interest in *Cleveland* flowed from the fundamental distinction between the kind of control exercised by a sovereign in regulating property and the control afforded by property rights. *Id.*

II. RICO AUTHORIZES PERMANENT INJUNCTIONS IN PRIVATE RICO ACTIONS

A. Private Injunctions Are Available Under A Plain Reading Of 18 U.S.C. § 1964.

As this Court has instructed, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette,* 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania Inc.,* 447 U.S. 102, 108 (1980)). In this case, the plain language of section 1964 unambiguously provides for permanent injunctions in RICO actions brought by private parties.[18]

---

[18] Section 1962 of RICO establishes the elements of a RICO violation, for which section 1964, entitled "Civil remedies," provides, in pertinent part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but

(Continued on following page)

Looking first at the text of subsection 1964(a), which authorizes a district court to grant permanent injunctions, that subsection is most naturally read to authorize such relief in all actions brought to remedy violations under section 1962. Nothing in the text of subsection 1964(a) limits such relief to an action brought under subsection 1964(b) or subsection 1964(c). The only textual limitations on the district court's authority to award an injunction are that a "violation[ ] of section 1962" has to be established and the injunction must be "appropriate." A violation of section 1962 can be established in either a proceeding under subsection 1964(b) or an action under subsection 1964(c), and the statute nowhere indicates that injunctions would be "appropriate" in one type of action but not the other.

Nor do subsections 1964(b) and 1964(c) limit the parties who may seek injunctions. Subsection 1964(b)

---

not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964(a)-(c).

provides that the Attorney General may seek an injunction "[p]ending final determination," and subsection 1964(c) provides that private litigants may seek treble damages. But, the mention of these two distinct types of remedies has no bearing on the question of availability of permanent injunctions.[19]

With respect to permanent injunctions, then, both the Attorney General and private litigants stand in precisely the same position. Subsection 1964(b) does not authorize the Attorney General to obtain such relief, nor does subsection 1964(c) authorize private litigants to obtain such relief. Both must look to subsection 1964(a) for authority to seek such relief.

The Government, contending that the Attorney General is the sole litigant who may seek permanent injunctions, argues that the Attorney General stands in a special relationship to the injunctive relief authorized by subsection 1964(a) because "Section 1964(b) expressly grants the Attorney General the right to bring actions under 'this section,' an obvious cross-reference to the court's power to award injunctive relief under Section 1964(a)," whereas "Section 1964(c) . . . is a free-standing, self-contained grant of a private right to recover treble-damages." U.S. Br. at 8.

This argument is without merit. Subsection 1964(b)'s identification of the Attorney General's proceeding as one

---

[19] At most, one might be able to conclude, by implication from these specific mentions of relief, that Congress intended that *preliminary* injunctive relief should be exclusively the province of the Attorney General and that treble damages should be the exclusive province of private litigants. But, neither the mention of preliminary injunctive relief in subsection 1964(b) nor the mention of treble damages in subsection 1964(c) can be read to imply that those are the *only* forms of relief available, respectively, to the Attorney General and to private litigants. Such an interpretation would result in the absurd consequence that the Attorney General could only seek *preliminary* relief.

"under this section" is not "an obvious cross-reference to . . . [sub]section 1964(a)" – instead, it is an obvious reference to section 1964, *generally*. As such, the identification of the Attorney General's proceeding as one "under this section" in no way differentiates it from a private litigant's cause of action, brought under the authority of subsection 1964(c). Obviously, *both* are actions "under this section," that is, under section 1964. If the fact that a proceeding is one "under" section 1964 suffices to establish entitlement to permanent injunctions, that logic extends to private litigants as well as the Attorney General.

B. The Availability Of Private Injunctions Serves The Purposes Of RICO.

Congress intended that victims would be able to obtain compensation for racketeering activities. As this Court noted, Congress in enacting RICO also intended to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices." *Rotella v. Wood,* 528 U.S. 549, 557 (2000). "The object of civil RICO is . . . not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Id.* (internal citation omitted).

The availability of permanent injunctions in private actions is essential to effectuate Congress' intent both to empower victims to redress racketeering injuries and to enable private litigants to act as "private attorneys general." RICO targets perpetrators who engage in patterns of racketeering activity, with objectives that are long-term: controlling and participating in the conduct of enterprises. *See* 18 U.S.C. § 1962. Persons injured in their business or property by such perpetrators cannot obtain adequate

redress, or act as private attorneys general, unless they can obtain permanent injunctions.[20]

Consider, for example, a case in which organized crime figures attempt to control a legitimate corporation through a pattern of racketeering activity – a paradigmatic RICO case. Under petitioners' construction of § 1964, without the intervention of the Attorney General, the legitimate directors of the corporation would be unable to obtain an injunction to prevent illegitimate directors from acting on behalf of the corporation, to reverse corporate restructurings effected by the racketeers, or to gain control of corporate assets wrongfully transferred.

The present case also powerfully illustrates the effect that petitioners' construction would have on Congress' remedial scheme. The petitioners' stated objective was to eliminate the provision of abortion services. The petitioners' extortionate conduct was ongoing: on a continuing basis, they sought to leverage the fear that their "rescue" operations had instilled to make demands on abortion clinics. Under petitioners' construction of § 1964, their victims would not be able to enjoin their continuing use of illegal threats and demands, subverting the purposes of RICO.[21]

---

[20] Requiring parties to repeatedly sue for damages for each successive act does not ensure the cessation of such activity and is a waste of judicial and party resources, just as the limitations on civil RICO actions this Court rejected in *Sedima* would have created a "wasteful splitting of actions." *See, Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 490 n.9 (1985).

[21] The Government suggests that permitting private parties to obtain injunctive relief under RICO "adversely affect[s]" the Government's ability to enforce RICO. U.S. Br. at 1. The Government cites, without explanation, conflicts over disgorgement remedies. *Id.* But, if the concern is with competing claims to limited funds, private parties' clear entitlement to treble damages would surely pose the greater danger. The Government also cites concerns about dissolution remedies. *Id.* at 14. But many laws permit private, as well as government, litigants to request such relief, *see, e.g., California v. American Stores*

(Continued on following page)

C. The Legislative History Of § 1964 Is Consistent With Recognition Of Private Injunctive Relief.

To the extent it is instructive, the legislative history supports the availability of permanent injunctions in private RICO actions. In the House Report discussing § 1964, the sponsors of the bill explained: "Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." H.R. Rep. No. 1549, 91st Cong. 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4407, 4434. This explanation confirms that RICO's drafters agreed with the common sense proposition discussed in the previous section – that litigants should be able to obtain all remedies necessary to "remov[e] the corrupting influence" of racketeering activities.

Petitioners, in arguing the contrary point, rely on isolated floor statements and withdrawn amendments. First, they note that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek an injunction explicit. OR Br. at 17. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." *Id.* Second, they note that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate

Co., 495 U.S. 271, 275 (1990) (holding that private litigants may seek divestiture, and other similar relief under the federal antitrust laws); Cal. Corp. Code § 1800(b)(4); N.Y. Bus. Corp. L. §§ 1101-1103; and experience demonstrates that courts are capable of mediating between competing remedial claims of litigants and of identifying appropriate relief.

with the same language as the Steiger amendment. *See id.* n.16. From these two occurrences, they conclude Congress has manifest an intent not to authorize private injunctions under RICO. *Id.* at 18.

Neither floor statements nor withdrawn amendments are reliable sources of legislative intent.[22] In any event, these particular floor statements and withdrawn amendments do not provide the kind of "clearly expressed legislative intent to the contrary" that would obviate unambiguous statutory language. *National Organization for Women v. Scheidler*, 510 U.S. 249, 261 (1994) (internal citations and quotation marks omitted). In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), this Court considered a claim that the withdrawal of the Steiger amendments – the very amendments that petitioners point to here – demonstrated that Congress was opposed to one of the provisions of those amendments, a uniform limitations period. This Court rejected the argument, noting that Congress did not reject the proposed amendment; rather, Representative Steiger voluntarily withdrew it for referral to the House Judiciary Committee for further study. *Id.* at 154-55. The Court declined to infer any hostility toward a uniform limitations period from Congress' failure to enact a predecessor bill to RICO that would have provided for a uniform statute of limitations, observing that there were other possible explanations for

[22] *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, ___, 122 S.Ct. 941, 954 & n.15 (2002) (holding that floor statements of bill sponsors could not amend the clear language of a statute, and noting that representations made on the floor do not "garner[ ] the support of the House, Senate, and the President"); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (warning that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (same).

the bill's withdrawal. *Id.* at 155. Similarly, the withdrawal of the Steiger Amendments is not probative of Congress' intent with respect to the availability of equitable relief in private RICO actions.

D. Comparison With The Antitrust Laws Does Not Support The Contention That Congress Intended To Foreclose Injunctions In Private RICO Actions.

Petitioners and the Government contend that a comparison of the antitrust laws to RICO supports their position, arguing that, in enacting RICO, Congress "borrowed precisely the remedial language [from the antitrust laws] that this Court had held *not* to authorize private injunctive relief, and *declined* to borrow a separate provision of antitrust law expressly conferring private injunctive remedies." OR Br. at 11 (emphasis in original); *see* U.S. Br. at 9-12. The premise of this argument is incorrect.

It is true that, prior to enactment in 1914 of section 16 of the Clayton Act, 38 Stat. 737, this Court had held that the then-existing antitrust laws gave the Government the exclusive authority to seek injunctions. *See, e.g., Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904).[23] But, at that time, the only provision of the antitrust laws authorizing injunctions, section 4 of the Sherman Act, clearly identified a distinct role for the Government in seeking such relief:

> The several circuits of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; *and it shall be the duty of the several district attorneys of the United States ... under the direction of the Attorney-General, to institute proceedings in*

[23] Under the antitrust laws as currently drafted, there is no question that private litigants may seek injunctive relief. *See American Stores*, 495 U.S. at 275.

> *equity to prevent and restrain such violations. ...* [P]ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

26 Stat. 209-210 (1890) (emphasis added). Private actions were separately authorized by § 7 of the Sherman Act, and, in contradistinction to § 4's explicit reference to the Government's role in seeking injunctions, § 7 made no reference to injunctions. *Id.* at 210.

In holding that, for purposes of the antitrust laws, "Congress has prescribed a specific mode for preventing restraints upon [trade], namely, suits in equity under the direction of the Attorney General," *Minnesota v. Northern Sec. Co.*, 194 U.S. at 71, the Court relied on the fact that the Sherman Act identified a distinct role for the Government in seeking permanent injunctions. Section 4 of the Sherman Act made it the "*duty*" of the Attorney General "to institute proceedings in equity to prevent and restrain [antitrust] violations," and the Court interpreted this direction to mean that it is the *exclusive* duty, and province, of the Government to institute equity proceedings. *See id.* (interpreting Congress' direction that the Government has the duty to institute proceedings as indicating a congressional intent "to limit direct proceedings in equity to prevent and restrain [antitrust] violations ... to those instituted in the name of the United States").

In enacting RICO, Congress did not carry over those aspects of Sherman Act §§ 4 and 7 that identified a *distinct* role for the Government in seeking permanent injunctions. To the contrary, as discussed above, in RICO Congress enacted a broad equity provision, § 1964(a), which contains no language that could be construed as limiting permanent injunctions to any particular litigant. And, in describing the types of actions that various litigants may bring, Congress chose not to describe the Government's (or any other litigant's) action as a "proceeding[ ] in equity to prevent and restrain ... violations."

Indeed, neither subsection 1964(b) nor subsection 1964(c) makes any reference to permanent injunctions. In short, in contrast to the pre-1914 antitrust laws, § 1964 cannot be interpreted as defining an *exclusive* role for the Government in seeking permanent injunctions to restrain violations, because it does not even define any *distinct* role for the Government in this regard.

E. Public Policy Considerations Support The Availability Of Injunctions In Private Civil RICO Actions

Confronted with the nationwide scope of criminal conduct by anti-abortion extremists, including activities that were designed to overwhelm local law enforcement, then-Attorney General Janet Reno concluded that the problem caused by Operation Rescue and like groups "transcends the ability of any single local jurisdiction to address it." *The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Senate Committee on Labor and Human Resources*, 103d Cong. 10 (1993) (May 12, 1993 Testimony of Attorney General Janet Reno at 4). Similarly, in adopting a Resolution urging passage of what became known as the Freedom of Access to Clinic Entrances Act of 1994 (FACE), the National Association of Attorneys General noted that, "since 1980 in the United States, over 400 bombings, arsons and acts of vandalism have been directed at family planning clinics." *Id.* at 163 (annex to statement of New York Attorney General Robert Abrams).[24]

[24] Ironically, petitioners' supporters argue that the legislative history of FACE supports their position. They argue that, if RICO and the Hobbs Act could be applied in the manner the courts here applied them, "FACE would have been unnecessary," and they cite a statement of then-Attorney General Reno, that no existing federal law "'would be generally applicable to private interference with a woman's right to choose'" as evidence that she did not believe the Hobbs Act could be

(Continued on following page)

The enactment of FACE has unquestionably aided efforts to control violent, extremist anti-abortion activities. But, FACE has not put an end to such activities.[25] Despite a string of locally-issued injunctions (*see, e.g.*, Life Legal Defense Foundation *amicus* brief at p. 13, n.15, listing California injunctions), Operation Rescue and other anti-abortion leaders are committed to pursue their objectives by illegal means. As one commentator has noted:

> [P]erhaps because anti-abortion protest leaders take a broad and long-term view of their organizations' objectives, the threat of FACE charges has not sufficiently deterred their illegal activities. Protestors continue to defy state and local criminal laws and reduce the effectiveness of injunctions by varying venues and spreading their actions among many individuals. Additionally, even in cases like [*United States v. Dinwiddie*, 76

applied to illegal activity by anti-abortion extremists. Alabama Br. at 18 (internal citation omitted). As an initial matter, as a result of the Seventh Circuit's earlier decision dismissing this action, there unquestionably was some doubt in 1993 whether RICO could be applied to any conduct by anti-abortion extremists. *See NOW v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992) (dismissing this action on the ground that "RICO requires either an economically motivated enterprise or economically motivated predicate acts"), *rev'd*, 510 U.S. 249 (1994). But, more to the point, respondents' position, and the position laid out in this brief in support of respondents, is *not* that RICO and the Hobbs Act are "generally applicable to private interference with a woman's right to choose." Rather, it is that those laws are appropriately applied when, as here, anti-abortion extremists take the illegal approach of leveraging force and fear to demand the cessation of abortion services.

[25] *See, e.g.*, California Senate Office of Research, *Crimes Against Reproductive Rights in California*, May 2001 (Revised January 2002), p. 8 of 24 *available at* http://www.sen.ca.gov/sor/Reprocrimes.htm (cataloguing violent crimes against clinics by anti-abortion extremists, on the basis of an October 2000 California Senate Office of Research survey of 172 publicly identified abortion providers in California regarding incidents occurring between January 1, 1995 and late 2000).

> F.3d 913 (1996)], in which plaintiffs successfully obtain a permanent nationwide injunction for violations of FACE, the injunction applies only to protestors found at the clinics. RICO injunctions have teeth because they give courts an effective way to enjoin illegal protest planning. In effect, RICO relief extends beyond the clinic entrance.

Comment, 115 Harv. L. Rev. 1745, 1751 (2002) (citations omitted). As this analysis suggests, allowing private parties to seek civil injunctions conserves and supplements law enforcement resources and provides a meaningful remedy to victims of ongoing, organized violence, extortion, and other racketeering.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BILL LOCKYER,
Attorney General of the State of California
MANUEL M. MEDEIROS
Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
MARY E. HACKENBRACHT
Senior Assistant Attorney General
HELEN G. ARENS*
Deputy Attorney General

ELIOT SPITZER,
Attorney General of the State of New York
CAITLIN J. HALLIGAN
Solicitor General
DANIEL J. CHEPAITIS
Assistant Solicitor General

* *Counsel of Record*

(Additional Counsel Listed Inside Front Cover)

September 17, 2002

43
430

Supreme Court, U.S.
FILED
SEP 17 2002
CLERK

Nos. 01-1118, 01-1119

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURRAY, AND THE PRO-LIFE ACTION NETWORK, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS AND WOMEN IN FEDERAL LAW ENFORCEMENT, INC. IN SUPPORT OF RESPONDENTS NATIONAL ORGANIZATION FOR WOMEN, INC., et al.

MARIA T. VULLO
Counsel of Record
ERIC A. STONE
WILLIAM J. TAYLOR, JR.
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Counsel for Amici Curiae

SEPTEMBER 17, 2002

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. EXTORTION UNDER THE HOBBS ACT PROHIBITS CONDUCT THAT CAUSES THE SURRENDER OF PROPERTY 7

A. The "Property" That Is the Subject of Extortion Need Not Be Tangible 7

B. The Perpetrator Need Not Personally Receive The Property 9

II. THE HOBBS ACT'S DEFINITION OF EXTORTION IS SHARED BY ALL THE FEDERAL EXTORTION STATUTES 13

A. The Hobbs Act's Definition of Extortion Merely Codifies the Common Law 14

B. Petitioners' Position Would Decriminalize Clear Federal Criminal Conduct 17

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Buchanan v. *Warley*, 245 U.S. 60 (1917) 7

Crans v. *Commissioner*, 331 U.S. 1 (1947) 7

Dobbins v. *City of Los Angeles*, 195 U.S. 223 (1904) 7

Evans v. *United States*, 504 U.S. 255 (1992) 8, 15-17, 20

Jones v. *United States*, 529 U.S. 848 (2000) 13

Libertad v. *Welch*, 53 F.3d 428 (1st Cir. 1995) ... 11, 18

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 7

Marsh v. *Nichols, Shepard & Co.*, 128 U.S. 605 (1888) 7

Morissette v. *United States*, 342 U.S. 246 (1952) 16-17,20

National Organization for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 17

Stirone v. *United States*, 361 U.S. 212 (1960) 13

Town of West Hartford v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) 10

United States v. *Anderson*, 716 F.2d 446 (7th Cir. 1983) 11, 18, 22

United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999) 8-10, 18

United States v. *Carlock*, 806 F.2d 535 (5th Cir. 1986) 11

United States v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979) 12

United States v. *Clemente*, 640 F.2d 1069 (2d Cir. 1981) 12

United States v. *Craft*, 122 S. Ct. 1414 (2002) 7

United States v. *Culbert*, 435 U.S. 371 (1978) 13, 15

United States v. *Enmons*, 410 U.S. 396 (1973) 8, 15

United States v. *Frazier*, 560 F.2d 884 (8th Cir. 1977) 11-12

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 7

United States v. *Gray*, 260 F.3d 1267 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2672 (2002) 13

United States v. *Green*, 350 U.S. 415 (1956) 12

United States v. *Haimowitz*, 725 F.2d 1561 (11th Cir. 1984) 12

Page

United States v. *Hairston*, 46 F.3d 361 (4th Cir. 1995) 11

United States v. *Hoelker*, 765 F.2d 1422 (9th Cir. 1985) 9

United States v. *Hyde*, 448 F.2d 815 (5th Cir. 1971) 11

United States v. *Jackson*, 180 F.3d 55 (2d Cir. 1999) 15-16, 20-21

United States v. *Lance*, 536 F.2d 1065 (5th Cir. 1976) 21

United States v. *Lewis*, 797 F.2d 358 (7th Cir. 1986) 11, 18

United States v. *Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985) 9

United States v. *Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942) 15

United States v. *Malone*, 222 F.3d 1286 (10th Cir.), *cert. denied*, 531 U.S. 1028 (2000) 13

United States v. *Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980) 6, 20

United States v. *Nadaline*, 471 F.2d 340 (5th Cir. 1973) 9

United States v. *Nardello*, 393 U.S. 286 (1969) 20

Page

United States v. *Panaro*, 266 F.3d 939 (9th Cir. 2001) 11, 18

United States v. *Santoni*, 585 F.2d 667 (4th Cir. 1978) 9, 11

United States v. *Sweeney*, 262 F.2d 272 (3d Cir. 1959) 12

United States v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969) 8, 12

United States v. *Trotta*, 525 F.2d 1096 (2d Cir. 1975) 12

United States v. *Zemek*, 634 F.2d 1159 (9th Cir. 1980) 9

STATE CASES

People v. *Barondess*, 31 N.E. 240 (N.Y. 1892) 8

People v. *Hughes*, 32 N.E. 1105 (N.Y. 1893) 8

People v. *Weinseimer*, 102 N.Y.S. 579 (App. Div.), *aff'd*, 83 N.E. 1129 (N.Y. 1907) 8

FEDERAL STATUTES AND LEGISLATIVE MATERIALS

The Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 872 18

Page

18 U.S.C. § 875 ..... 18, 20

18 U.S.C. § 876 ..... 6, 18, 21

18 U.S.C. § 877 ..... 18, 21-22

18 U.S.C. § 878 ..... 6, 18-19, 21

18 U.S.C. § 1030 ..... 19, 22

The Travel Act, 18 U.S.C. § 1952 ..... 19, 22

18 U.S.C. § 2113 ..... 19, 22

The Anti-Racketeering Act of 1934, 18 U.S.C. § 420a (1934) 14-15

91 Cong. Rec. 11,912 (1945) 16

S. Rep. No. 73-532 (1934) 16

MISCELLANEOUS

1 W. Blackstone, *Commentaries* 7

Webster's Third New International Dictionary (1976) 10

INTEREST OF *AMICI CURIAE*[1]

The Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. § 1951, is a cornerstone of federal criminal prosecution. It prohibits acts ranging from common extortion and robbery to international terrorism. *Amici* are former prosecutors and current members of law enforcement who have relied on the Hobbs Act to deter and punish acts against our nation and its citizens. *Amici* also are fully aware that the Hobbs Act is not the only federal statute that reaches a broad range of extortionate activities. *Amici* thus are also concerned that reversal of the opinion below, as petitioners here urge, would severely limit the federal government's ability to respond to extortion of all kinds under the Hobbs Act and other federal extortion statutes. Accordingly, *Amici* submit that this Court should consider the impact of this case on a broad range of federal criminal activity and construe the Hobbs Act, as respondents urge, to encompass crimes that cause the victim to surrender property.

Scott R. Lassar, former United States Attorney for the Northern District of Illinois; Anton R. Valukas, former United States Attorney for the Northern District of Illinois; Dan K. Webb, former United States Attorney for the Northern District of Illinois; Mark F. Pomerantz, former Assistant United States Attorney and Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York; Ronald S. Safer, former Assistant United States Attorney and Chief of the Criminal Division of the United

---

[1] All parties in this matter have consented to the filing of this *Amici Curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *Amici* and their counsel has made any monetary contribution to the preparation of this brief.

States Attorney's Office for the Northern District of Illinois; Steven A. Miller, former Assistant United States Attorney and Chief of the Special Prosecutions Section and the Banking and Financial Institutions Fraud Unit of the United States Attorney's Office for the Northern District of Illinois; David C. Bohan, former Assistant United States Attorney for the Northern District of Illinois; Mark S. Hersh, former Assistant United States Attorney for the Northern District of Illinois; and Scott F. Turow, former Assistant United States Attorney for the Northern District of Illinois, are former federal prosecutors who have relied on the Hobbs Act and other federal extortion statues to combat acts of extortion and terrorism of all kinds. *Amici* have prosecuted acts of extortion in the federal courts.

Women in Federal Law Enforcement, Inc. (WIFLE), established in June 1999 as an outgrowth of an interagency committee formed in 1982 by the U.S. Departments of Treasury and Justice, is an organization of women and men who endeavor to achieve gender equity throughout the law enforcement profession, resulting in better service to the public. The majority of WIFLE's members are women currently employed by federal law enforcement agencies, including by the Federal Bureau of Investigation (FBI), the federal agency with primary investigative jurisdiction over criminal violations of the Hobbs Act.

Amici fully support Respondents' arguments for affirmance in this case.[2]

---

[2] *Amici* urge affirmance on both questions as to which the Court granted certiorari. In this brief, however, we address only the second question.

STATUTORY PROVISIONS INVOLVED

The text of the Hobbs Act, 18 U.S.C. § 1951, and other federal extortion statutes discussed in this brief, *see infra* pp. 18-23, are set forth in an appendix to this brief. App., *infra*.

STATEMENT

Amici adopt Respondents' Statement and note the following facts relevant to the legal discussion in this brief.

This case was brought on behalf of full-service health clinics and their patients whose interstate business operations repeatedly have been disrupted by petitioners' nationwide campaign of violence and terror. The evidence presented below demonstrated beyond doubt that the petitioners engaged in a pattern of crimes that were designed to deprive health centers and their patients of their property rights in violation of the Hobbs Act. Respondents have suffered substantial economic injury as a result of petitioners' unlawful conduct, which unquestionably has affected their ability to provide medical care to their patients throughout the country. In addition, by finding petitioners liable under the Hobbs Act, the jury found, *inter alia*, that petitioners' conduct affected interstate commerce and was not protected speech under the First Amendment. These findings are not the subject of this appeal.

The jury properly found under the trial court's instructions that petitioners' conduct constituted extortion because it resulted in the loss of respondents' property at petitioners' behest. The evidence below demonstrated that the unlawful activities of the petitioners included the use of force to make clinics close their doors and patients give up their appointments: petitioners closed clinics forcibly with cement blocks, pipes, fence posts and Kryptonite locks.

Using metal pipes and metal boxes, petitioners attached themselves to the clinic structure so they could be removed only with special metal-cutting tools. Clinics that did not surrender to petitioners' unlawful threats incurred costs for repairs and for security to protect their patients and staff. Patients bore the burden of added hotel and transportation expenses as well as emergency medical care. And, it was not just patients seeking abortions who were forcibly induced to abandon their appointments with the medical centers. The clinics offered a broad range of services, including gynecological treatment and adoption services, and petitioners targeted every woman with an appointment at the clinics, including those seeking cancer screening or treatment, fertility treatment, annual physicals, and contraceptive products and counseling. All of these deprivations of property were the proper basis for the jury's verdict and the trial court's injunction in this case.

Further, the evidence below established far more than mere "interference" with the rights of clinics and patients. The jury was instructed that each predicate act had to be based on the *wrongful* use of force, violence or fear, and that constitutionally protected and other lawful conduct was excluded. Because the Hobbs Act requires the obtaining of property with the victim's consent induced by wrongful acts, respondents below relied only on conduct that was designed to make respondents give up their right to do business with each other, not on crimes where there was no demand to surrender property.

After the jury rendered its unanimous verdict, the trial court heard additional evidence on whether an injunction was necessary. After hearing all of the evidence, the trial court found that petitioners' pattern of crimes had continued unabated and thus concluded that an injunction was necessary. The Seventh Circuit affirmed the jury verdict and injunction by the trial court, ruling that the Hobbs Act fully

reached petitioners' unlawful conduct. This Court should affirm.

SUMMARY OF ARGUMENT

The Hobbs Act, 18 U.S.C. § 1951, is one of several federal extortion statutes that share a common definition of extortion. That definition is routinely held to encompass crimes such as those committed by petitioners here: crimes in which the extortionist induces the victim to surrender or destroy property of value to the victim. These crimes can include extortionate demands that foreign embassy staff destroy documents, or extortionate demands that individuals cease practicing their religion or else suffer financial harm. If the Court reverses the decision below, its holding will necessarily remove these and all other similar crimes from the ambit of the federal extortion statutes. That result is not required by the plain text of these statutes, their legislative history, public policy, or common sense. Congress's plain intent is for extortion statutes to reach broadly to deter and punish a wide range of crimes such as those found by the jury below, where the victim indisputably surrenders property at the extortionist's behest and suffers financial injury as a result.

This Court should not read the "obtaining" and "property" elements of the Hobbs Act as implying additional jurisdictional requirements. None of the federal extortion statutes -- including the Hobbs Act -- impermissibly intrudes into areas reserved to the States. None asks the States to engage in any conduct or prohibits them from engaging in any conduct. Moreover, each is tied to an express constitutional grant of Congressional power. In the case of the Hobbs Act, a jury must find -- as did the jury below -- a nexus with interstate commerce before returning a conviction (or a finding of civil liability). Thus, the civil liability verdict

below was properly predicated on Hobbs Act extortion and consequent RICO liability.

ARGUMENT

This case is not about abortion and is about much more than the Hobbs Act. Indeed, at its core, this case threatens the enforcement of a broad range of federal extortion statutes. The meaning of the term "extortion" in each of these statutes is construed in parallel with the meaning of that term in the Hobbs Act. If petitioners prevail in this case, enforcement of these other federal extortion statutes will be greatly undermined. *Amici* respectfully submit that there is no need for this Court to reach an outcome that would curtail enforcement of the various federal extortion statutes. The statutory language and the common law of extortion ascribe broad definitions to the terms "property" and "obtain[ing]" in the Hobbs Act, which definitions fully support the decision below.

In *United States* v. *Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980), for example, Puerto Rican separatists kidnapped the Chilean Consul in San Juan, demanding that, among other things, the Fourth of July Celebration in Puerto Rico be cancelled. Although the First Circuit held such unlawful conduct to be extortion in violation of 18 U.S.C. § 878, that ruling would not survive reversal in this case under petitioners' legal theory. Similarly, if petitioners' arguments were accepted, this Court's decision regarding the Hobbs Act would determine whether (for example) threatening a government official into changing his vote on a key issue constitutes extortion under 18 U.S.C. § 876. None of these outcomes, or others discussed below, is warranted by existing law. Accordingly, this Court should affirm the Seventh Circuit's decision.

I.

EXTORTION UNDER THE HOBBS ACT PROHIBITS CONDUCT THAT CAUSES THE SURRENDER OF PROPERTY

The Hobbs Act prohibits extortionate interference with interstate commerce, and it defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Contrary to petitioners' suggestion, "property" is not limited to tangible objects, money, and securities. And Hobbs Act extortion contains no asportation requirement, as petitioners further misguidedly urge. Instead, the Hobbs Act -- as it has been properly construed for decades -- broadly prohibits -- as it should -- threats intended to cause the destruction or surrender of property of the victim.

A. The "Property" That Is the Subject of Extortion Need Not Be Tangible

This Court has long recognized that "[p]roperty is more than the mere thing which a person owns." It "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917) (citing 1 W. Blackstone, *Commentaries* *127). Property subsumes the "[p]ower over [the] use" of tangible things. *Marsh* v. *Nichols, Shepard & Co.*, 128 U.S. 605, 612 (1888); *accord United States* v. *Craft*, 122 S. Ct. 1414, 1423 (2002); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Crans* v. *Commissioner*, 331 U.S. 1, 6 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945); *Dobbins* v. *City of Los Angeles*, 195 U.S. 223, 236 (1904).

In this case, the United States as *amicus curiae* correctly states that "[i]t was settled when Congress passed the Hobbs Act in 1946 that the term 'property' includes the exclusive right to control the use of business assets, such as buildings and equipment, in any legitimate manner." (SG Br. at 15-16.) Further, as the United States also asserts, "[p]roperty under the Hobbs Act includes not only the tangible and intangible assets of a business but also the *control* over those assets." (*Id.* at 15.)

Indeed, early New York cases, on which the Hobbs Act is based, *see Evans* v. *United States*, 504 U.S. 255, 261 n.9, 264-65 (1992); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973), also recognized that intangible property can be extorted. *See, e.g.*, *People* v. *Barondess*, 31 N.E. 240, 241 (N.Y. 1892) (work stoppage effects an injury to a business that constitutes an injury to "property."); *accord People* v. *Hughes*, 32 N.E. 1105, 1108 (N.Y. 1893); *People* v. *Weinseimer*, 102 N.Y.S. 579, 587 (App. Div.), *aff'd*, 83 N.E. 1129 (N.Y. 1907).

The Circuit Courts of Appeal also agree that extortion includes threats to obtain intangible property. For example, the Second Circuit held over thirty years ago that "the concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth . . . ." *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) (citations omitted). That court has recently reaffirmed this proposition and explained that "[t]he concept of 'property' under the Hobbs Act is an expansive one. While often the property involved is an existing physical asset, the concept is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business." *United States* v. *Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (citations omitted). In

Arena, "the property at issue . . . was the intangible right to conduct business free from threats of violence and physical harm." *Id.* at 394. The Third Circuit agrees. *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) ("[T]he language of the Hobbs Act makes no . . . distinction between tangible and intangible property."). So, too, does the Fourth Circuit, which has held that "[e]xtortion under the Hobbs Act . . . includes intangible as well as tangible property." *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (citation omitted). Specifically, it includes the right "to make a business decision free from outside pressure wrongfully imposed." *Id.* The Fifth Circuit has also held that "business accounts and . . . unrealized profits from those accounts" are "intangible property" protected by the Hobbs Act. *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973). And the Ninth Circuit agrees that "[t]he right to make business decisions and to solicit business free from wrongful coercion is a protected property right," the deprivation of which can be a Hobbs Act violation. *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980); *accord United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985).

This settled legal principle should be applied fully in this case.

B. The Perpetrator Need Not Personally Receive The Property

This Court should also reject petitioners' argument that the word "obtain" in the Hobbs Act exclusively means that the defendant himself must "get" or "acquire" the victim's property. By its plain interpretation, the word "obtain" also includes the defendant's "obtaining" control over the victim's property which control causes the victim to discard or surrender that property. Indeed, the overwhelming majority of courts have held that the Hobbs Act properly

encompasses threats or use of force intended to cause the victim to surrender his own property.[3]

The First, Second, and Seventh Circuit Courts of Appeal correctly have so held. As the Second Circuit has explained, "[s]ince the Hobbs Act concept of property is broad, '[t]he Act's requirement that property be "obtain[ed]" is given a similarly broad construction.'" *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (alterations in original) (quoting *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990)). Under this proper construction, "[a] perpetrator plainly may 'obtain[]' property without receiving anything, for obtaining includes 'attain[ing] . . . disposal of.'" *Id.* (alterations in original) (quoting *Webster's Third New International Dictionary* 1559 (1976)). The extortionist thus obtains property even without taking possession of it, when he uses violence or threats of violence to force his victim to abandon it. *Id.* The *Arena* case, like this case, involved threatening conduct designed to prevent doctors from practicing their profession. The Second Circuit held that "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.*

---

[3] The United States as *amicus curiae* asserts that "where the property at issue is a business's *intangible* right to exercise exclusive control over the use of its assets, the defendant obtains that property by obtaining control over the use of those assets." (SG Br. at 22.) While this argument reaches the correct outcome on the facts of this case, we submit that it is, like the petitioners' argument, too cramped a reading of the word "obtain." As we explain in the text, the defendant obtains the victim's intangible right to operate his business when by threat or force he causes the victim to relinquish that right.

Similarly, in *United States* v. *Anderson*, 716 F.2d 446 (7th Cir. 1983), the Seventh Circuit affirmed the Hobbs Act conviction of a defendant who, at gunpoint, threatened to kill a doctor unless that doctor ceased performing abortions. *Id.* at 447-50. That court later aptly stated that a defendant "would have violated [the Hobbs Act] if, for example, he had simply demanded that Johnson & Johnson burn $1 million in cash." *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986). These principles clearly are correct.

The First Circuit, too, has held that using threats or force to prevent others from operating their business constitutes extortion. In *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995), that court declared that it "is difficult to conceive a set of facts that more clearly sets forth extortion as it is defined by § 1951(b)(2)" than the use of "force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinic from conducting their normal, lawful activities" and resulting in "the clinics' loss of business." *Id.* at 438 n.6. *But see United States* v. *Panaro*, 266 F.3d 939, 943 (9th Cir. 2001) ("under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property").

The cases that hold that a person violates the Hobbs Act when he threatens or forces another into surrendering control of property embody a notion that has been part of extortion jurisprudence for decades: "the gravamen of the offense is loss to the victim." *United States* v. *Hyde*, 448 F.2d 815, 843 (5th Cir. 1971); *accord United States* v. *Hairston*, 46 F.3d 361, 365 (4th Cir. 1995); *United States* v. *Carlock*, 806 F.2d 535, 555 (5th Cir. 1986); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). This logical principle compels affirmance here.

Petitioners nonetheless argue that despite this longstanding principle, the Hobbs Act -- specifically, the word "obtain" -- requires a physical taking of property by the defendant in all cases. But even the authorities on which petitioners rely make plain that the "obtain" requirement is not to be read so limitedly. Indeed, this Court held almost fifty years ago that "extortion as defined in [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States* v. *Green*, 350 U.S. 415, 420 (1956). And, as noted above, following this Court's lead, the federal circuit courts have uniformly held that "[t]he concept of property under the Hobbs Act . . . does not depend upon a direct benefit being conferred on the person who obtains the property." *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) (citations omitted); *accord United States* v. *Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975); *United States* v. *Clemente*, 640 F.2d 1069, 1079-80 (2d Cir. 1981). Rather, "the offense is committed even though the person doing the extortion does not get the money." *United States* v. *Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959); *accord United States* v. *Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979). Thus, the Eighth Circuit in *Frazier*, for example, expressly rejected the defendant's argument that the "term 'obtaining of property,' as used in the Hobbs Act, means 'reducing to actual physical possession.'" 560 F.2d at 887; *see also United States* v. *Haimowitz*, 725 F.2d 1561, 1577 (11th Cir. 1984) ("[A] Hobbs Act prosecution is not defeated simply because the extorter transmitted the extorted monies to a third party.").

In sum, the great weight of authority holds that in extortion cases, the perpetrator need not take physical possession of the victim's property or cause the victim to deliver the property to a third party. That is the proper statement of the law. Under the Hobbs Act -- and, as we show below, under all of the federal extortion statutes -- the crime of extortion is completed if the defendant, by threats or

violence, causes the victim to surrender or destroy his own property. Accordingly, the judgment below should be affirmed.[4]

II.

THE HOBBS ACT'S DEFINITION OF EXTORTION IS SHARED BY ALL THE FEDERAL EXTORTION STATUTES

The Hobbs Act is only one of many federal extortion statutes. Through these provisions, Congress has prohibited extortion that implicates, *inter alia*, other nations, interstate travel, interstate commerce, the safety of foreign dignitaries, and the mail and postal services. These federal extortion

---

[4] Petitioners' federalism argument -- *i.e.*, that "[t]he Seventh Circuit's definition [of 'extortion' under the Hobbs Act] should also be rejected because of its potential to federalize all manner of traditional state offenses" -- is wholly without merit. (Scheidler Br. at 33; *see* OR Br. at 47-48.) In *United States* v. *Culbert*, 435 U.S. 371 (1978), this Court explicitly rejected any such federalism argument: "With regard to the concern about disturbing the federal-state balance, . . . there is no question that Congress intended to define as a federal crime conduct it knew was punishable under state law." *Id* at 379; *see Stirone* v. *United States*, 361 U.S. 212, 215 (1960) (holding that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence"); *see also Jones* v. *United States*, 529 U.S. 848, 854 (2000) (explaining that when Congress uses the statutory term "affecting commerce" without qualification, as it does in the Hobbs Act, it "inten[ds] to invoke its full authority under the Commerce Clause"); *United States* v. *Gray*, 260 F.3d 1267, 1275 (11th Cir. 2001) (noting that "the Hobbs Act has no qualifying language indicating that Congress intended to limit the Act's jurisdictional reach," but "[i]nstead, the language of the Hobbs Act indicates Congress's intent to invoke its full authority under the Commerce Clause"), *cert. denied*, 122 S. Ct. 2672 (2002); *United States* v. *Malone*, 222 F.3d 1286, 1295 (10th Cir.) (same), *cert. denied*, 531 U.S. 1028 (2000).

statutes,[5] the Hobbs Act included, share a common definition of "extortion." All of these statutes incorporate the common-law definition of extortion, expanded to encompass threats by private actors. Thus, the Court's holding in this case cannot be limited to the Hobbs Act. Indeed, the Court's interpretation of 18 U.S.C. § 1951(a)(2) will necessarily affect a multitude of statutory provisions in which Congress has prohibited clear federal criminal conduct. *Amici* therefore urge that the Court reject petitioners' cramped reading of the Hobbs Act in this case.

A. The Hobbs Act's Definition of Extortion Merely Codifies the Common Law

Under the Hobbs Act, "'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Congress did not include this definition of extortion in the Hobbs Act in order to differentiate "Hobbs Act extortion" from other federal extortion crimes. Indeed, the opposite is true: Congress included the definition of extortion in the Hobbs Act precisely to ensure that it was construed in accordance with the common law.

The history of the Hobbs Act makes this clear. The Hobbs Act was preceded by the Anti-Racketeering Act of 1934, which provided penalties for any person who "[o]btains property of another, with his consent, induced by wrongful use of force or fear, or under color of official right." 18 U.S.C. § 420a(b) (1934). It also provided penalties for any person who "[c]ommits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to" obtain property in

[5] The federal extortion statutes are listed below in Section II.B.

violation of Section 420a(b). 18 U.S.C. § 420a(c) (1934). Importantly, the Anti-Racketeering Act "required that the proscribed 'force, violence or coercion' lead to exaction of 'valuable consideration'" and excluded wage payments from the definition of "consideration." *United States* v. *Culbert*, 435 U.S. 371, 376 (1978); *Evans* v. *United States*, 504 U.S. 255, 261 n.9 (1992); *Enmons* v. *United States*, 410 U.S. 396, 401 n.6 (1973).

In *United States* v. *Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942), this Court held that because of its wage-payments exclusion, the Anti-Racketeering Act did not prohibit the actions of union truck drivers who had exacted money by threats or violence from out-of-town drivers in return for "undesired and often unutilized services." *Culbert*, 435 U.S. at 377 (citing *Teamsters*, 315 U.S. 521). The ruling in *Teamsters* led directly to the passage of the Hobbs Act, which was enacted to bring wage payments and union activity squarely within a statute prohibiting the obtaining of property by force or fear. *Id.* Thus, in drafting the Hobbs Act, Congress specifically included the term "extortion," which had not been included in the Anti-Racketeering Act. *Id.*

Although this Court has recognized that "[t]he legislative history" of the Hobbs Act "is sparse and unilluminating with respect to the offense of extortion," *Evans*, 504 U.S at 264, at least two important aspects of the history of the extortion language are quite clear. *First*, it is clear that the inclusion of language prohibiting extortion was not intended as a substantive change to the scope of the Anti-Racketeering Act, but rather as an express codification of what Congress had intended that prior Act to prohibit. As the Second Circuit recently observed, "[a]lthough the structure of the [Anti-Racketeering] Act differs from that of the Hobbs Act, the substance of their prohibitions is the same," *United States* v. *Jackson*, 180 F.3d 55, 68 (2d Cir. 1999), and it is

"quite clear that [in the Anti-Racketeering Act] Congress meant the statutory language to describe what it viewed as the essence of extortion, for the report of the Senate Judiciary Committee discussing the bill that would become the [Anti-Racketeering] Act stated that the bill was aimed at 'persons who commit acts of violence, intimidation and *extortion*.'" *Id.* (quoting S. Rep. No. 73-532, at 1 (1934)) (emphasis added).

Second, it is clear that Congress had no special (and certainly not a limited) meaning of extortion in mind in drafting the Hobbs Act. Congress simply sought to incorporate the common-law definition of extortion that had "accumulated the legal tradition and meaning of centuries of practice." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). This sentiment was probably best expressed by Representative Hobbs himself during debate on the bill that would become the Hobbs Act. Hobbs stated that the terms extortion and robbery "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11,912 (1945); *see also Evans*, 504 U.S. at 279 (Thomas, J., dissenting) ("Extortion is one of the oldest crimes in Anglo-American jurisprudence.").

Indeed, this Court has recognized that those portions of the Hobbs Act dealing with extortion by a public official -- including the terms "obtain" and "property" -- simply codify the common law:

> Although the present statutory text is much broader than the common-law definition of extortion because it encompasses conduct by a private individual as well as conduct by a public official, the portion of the statute that refers to official misconduct continues to mirror the common-law definition. There is nothing in either the statutory text or the

> legislative history that could fairly be described as a 'contrary direction,' *Morissette* v. *United States*, 342 U.S., at 263, 72 S. Ct., at 249- 250, from Congress to narrow the scope of the offense.

Evans, 504 U.S. at 263-64 (1992) (footnotes omitted).

Thus, while extortion is no longer confined to acts taken by government officials under color of law, *see, e.g.*, statutes cited *infra* pp. 18-19; *see also Evans*, 504 U.S. at 260-61 (1992), the Hobbs Act has otherwise fully preserved the common-law definition of an extortionate act. *See id.* at 259. Specifically; "extortion" comprises, as was the case here, a threat or violence intended to force another to relinquish property. *See, e.g.*, cases cited *supra* pp. 8-12. This broad common-law definition of extortion was intended by Congress to be encompassed by the Hobbs Act, as the plain language and legislative history demonstrate, and this Court should so hold and affirm the decision below.

B. Petitioners' Position Would Decriminalize Clear Federal Criminal Conduct

In *NOW I*, this Court held that the RICO statute does not require an economic motive. *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 262 (1994). Without directly saying so, petitioners now effectively ask this Court to revisit that ruling and hold that the Hobbs Act does require an economic motive. They argue that the extortion provisions of the Hobbs Act should be read limitedly to require asportation of property, either by a physical taking or through conversion. A criminal who simply causes the victim to surrender control of property by threat of violence cannot commit extortion, petitioners urge.

That is not the law. No asportation requirement existed at common law, and Congress has never imposed such a limitation by statute. With the lone exception of *dicta* in a Ninth Circuit opinion, no federal court has ever so held. *See United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999); *Libertad* v. *Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *United States* v. *Anderson*, 716 F.2d 446, 447-50 (7th Cir. 1983); *but see United States* v. *Panaro*, 266 F.3d 939, 943, 948 (9th Cir. 2001). This Court should not create such an extra-textual statutory requirement in this case. As respondents argue, the text of the Hobbs Act encompasses the crimes committed by petitioners in this case. And, the history of the Hobbs Act and the breadth of the many other federal extortion statutes make this even clearer.

Besides the Hobbs Act, at least eight sections of Title 18 criminalize acts of extortion. They are:

- Section 872 prohibits extortionate acts by officers or employees of the United States. 18 U.S.C. § 872.

- Section 875 prohibits extortionate communications in interstate or foreign commerce. 18 U.S.C. § 875(b), (d).

- Section 876 prohibits extortionate acts involving the United States Postal Service. 18 U.S.C. § 876.

- Section 877 prohibits extortionate communications mailed from a foreign country. 18 U.S.C. § 877.

- Section 878 addresses "extortionate demand[s]" in connection with any of three

other statutes: 18 U.S.C. §§ 112, 1116 & 1201, which, respectively, prohibit physical attacks on, murder of, or kidnapping of foreign officials and other international dignitaries within the United States. 18 U.S.C. § 878(b).

- Section 1030 prohibits extortionate threats to damage computers used by the federal government or by financial institutions regulated and/or insured by the federal government or used in interstate or foreign commerce or communication. 18 U.S.C. § 1030(a)(7), (c)(3), (e)(1)-(2).

- Section 1952, commonly known as the Travel Act, prohibits interstate travel or the use of the mails in order to commit extortion or distribute the proceeds of extortion. 18 U.S.C. § 1952(a), (b)(2).

- Section 2113 prohibits bank robbery, including the extortionate obtaining of any property or money belonging to or controlled by a bank. 18 U.S.C. § 2113(a).

These eight federal extortion statutes do not define the term "extortion," but simply use the term "extortion" without greater definition. As this Court has explained, this silence is to be interpreted as an implied incorporation of the longstanding historical meaning of the team "extortion." Thus,

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of

> learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. *United States*, 342 U.S. 246, 263 (1952). This rule of statutory construction was applied by this Court to the extortion context as recently as 1992. *See Evans* v. *United States*, 504 U.S. 255 (1992). And, more than thirty years ago, this Court announced that it would "decline to give the term 'extortion' an unnaturally narrow reading," and concluded that "extortion" as it appears in the Travel Act is a "generic term." *United States* v. *Nardello*, 393 U.S. 286, 296 (1969); *see also United States* v. *Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980) ("the term 'extortion' . . . has a well-settled meaning under federal law"). The same principle is no less true today.

While the Hobbs Act is the only federal extortion statute to contain an explicit definition of extortion, the Hobbs Act's definition of extortion simply codifies the same modern definition of extortion that is implied in these other federal extortion statutes -- which definition requires affirmance of the Seventh Circuit's decision in this case. Indeed, the Circuit Courts of Appeal have uniformly made this precise connection. In *United States* v. *Jackson*, 180 F.3d 55 (2d Cir. 1999), for example, the Second Circuit construed the meaning of extortion in 18 U.S.C. § 875 by reference to Representative Hobbs's comments and the *Morrissette* rule of statutory construction. It held that "[g]iven Congress's contemporaneous consideration of the predecessors of § 875(d) and the Hobbs Act, both of which focused on extortion, we infer that Congress's concept of extortion was the same with respect to both statutes." *Id.* at 70. The court stated further: "In enacting the Hobbs Act, Congress made

express what we would ordinarily presume with respect to the meaning of extortion." *Id.* at 69. And, in *United States* v. *Lance*, 536 F.2d 1065 (5th Cir. 1976), the Fifth Circuit held that "[t]he only difference between the Hobbs Act and [18 U.S.C.] § 876 is that § 876 concerns the use of mails, while the Hobbs Act is written in terms of commerce. The other elements of the offenses proscribed by the two statutes are the same." *Id.* at 1068. As the Second Circuit noted, "an overview of the Criminal Code reveals that, in enacting provisions dealing with extortion, Congress has simply been inconsistent as to the inclusion of . . . an extortion definition. The inconsistency in format does not appear to bespeak different legislative intentions as to the meaning of extortion . . . ." *Jackson,* 180 F.3d at 67.

This Court should not now create a safe harbor for extortionists by construing the Hobbs Act -- and, indeed, all other federal extortion statutes -- to require that the perpetrator personally obtain physical property. Such a ruling would have grave implications for federal law enforcement, because it would decriminalize serious criminal conduct that affects national interests, and criminal conduct that Congress has rightly outlawed through the various federal extortion statutes. A ruling in favor of petitioners would, for example:

- Prohibit the use of Section 876 to punish a person who mails a letter threatening to injure a political candidate unless she renounces her candidacy and withdraws from public life;

- Prohibit the use of Section 878 to punish a person who makes similar written or oral threats against a visiting foreign leader;

- Prohibit the use of Section 877 to punish people in foreign countries who mail letters

to residents of the United States threatening to attack their homes unless they cease practicing their religion;

- Prohibit the use of Section 1030 to punish a person who threatens to unleash a computer virus unless a stock exchange de-lists a publicly traded security, under circumstances in which the person making the threat receives no financial benefit from the security being de-listed;

- Prohibit the use of Section 1952 to punish a person who travels across state lines to threaten people with assault unless they stop wearing fur;

- Prohibit the use of Section 1952 to punish a person who mails letters to gun manufacturers threatening to infect their offices with anthrax unless they stop manufacturing guns; and

- Prohibit the use of Section 2113 to punish an anarchist who walks into a bank and demands at gunpoint that the tellers burn all of the money in the bank.

Clearly, none of these results is warranted.

The *Anderson* case from the Seventh Circuit shows that these hypotheticals are not far-fetched. *See United States* v. *Anderson*, 716 F.2d 446, 447-50 (7th Cir. 1983). That all have not yet occurred is due in part to effective enforcement of the federal extortion statutes. But, if petitioners prevail on this appeal, effective enforcement of those statutes will be seriously undermined. If the Hobbs Act does not prohibit the conduct in which the jury below found that petitioners

engaged, then the Hobbs Act will not reach a multitude of clearly criminal activity and none of the federal extortion statutes would reach any of the conduct described above either. Congress did not intend for that to be the law. And this Court should not declare that to be the law.

CONCLUSION

For the reasons stated above, and those in respondents' brief, *Amici* respectfully request that the Court affirm the Seventh Circuit's decision below.

Dated: New York, New York
September 17, 2002

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

By: Maria T. Vullo
Maria T. Vullo

1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for *Amici Curiae*
Former Federal Prosecutors
and Women in Federal Law
Enforcement, Inc.

Of Counsel:

Eric A. Stone
William J. Taylor, Jr.

APPENDIX

Pursuant to U.S. Supreme Court Rule 24(f), *Amici* provide the text of the relevant portions of the Hobbs Act, 18 U.S.C. § 1951, and the other federal extortion statutes discussed in this brief:

1. The Hobbs Act, 18 U.S.C. § 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * *

2. 18 U.S.C. § 872

§ 872. Extortion by officers or employees of the United States

Whoever, being an officer or employee of the United States or a department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

3. 18 U.S.C. § 875

§ 875. Interstate communications

* * * * *

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

* * * * *

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the

addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

4. 18 U.S.C. § 876

§ 876. Mailing threatening communications

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than twenty years, or both.

* * * * *

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

5. 18 U.S.C. § 877

§ 877. Mailing threatening communications from foreign country

Whoever knowingly deposits in any post office or authorized depository for mail matter of any foreign country any communication addressed to any person within the United States, for the purposes of having such communication delivered by the post office establishment of such foreign country to the Postal Service and by it delivered to such addressee in the United States, and as a result thereof such communication is delivered by the post office establishment of such foreign country to the Postal Service and by it delivered to the address to which it is directed in the United States, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits as aforesaid, any communication for the purpose aforesaid, containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than twenty years, or both.

* * * * *

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits as aforesaid, any communication, for the purpose aforesaid, containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other

person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

6. 18 U.S.C. § 878

§ 878. Threats and extortion against foreign officials, official guests, or internationally protected persons

* * * * *

(b) Whoever in connection with any violation of subsection (a) [which prohibits "threat[s] to violate section 112, 1116, or 1201"] or actual violation of section 112, 1116, or 1201 makes any extortionate demand shall be fined under this title or imprisoned not more than twenty years, or both.

* * * * *

7. 18 U.S.C. § 1030

§ 1030. Fraud and related activity in connection with computers

(a) Whoever –

* * * * *

(7) with intent to extort from any person, firm, association, educational institution, financial institution, government entity, or other legal entity, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

* * * * *

(c) The punishment for an offense under subsection (a) or (b) of this section is –

* * * * *

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection . . . (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection . . . (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

* * * * *

(e) As used in this section –

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer –

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in interstate or foreign commerce or communication;

* * * * *

8. The Travel Act, 18 U.S.C. § 1952

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform –

> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States . . . .

* * * * *

9. 18 U.S.C. § 2113

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

* * * * *

Shall be fined under this title or imprisoned not more than twenty years, or both.

* * * * *

(37) (33)

Nos. 01-1118, 01-1119

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMERICAN MEDICAL ASSOCIATION, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, CALIFORNIA MEDICAL ASSOCIATION, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, AMERICAN COLLEGE OF LEGAL MEDICINE AND ILLINOIS STATE MEDICAL SOCIETY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
WILLIAM A. NORRIS – *Counsel of Record*
EDWARD P. LAZARUS
MICHAEL C. SMALL
L. RACHEL HELYAR
SANDRA M. LEE
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: (310) 229-1000
Facsimile: (310) 229-1001

Attorneys for Amici Curiae American Medical Association, American College of Obstetricians and Gynecologists, California Medical Association, American Society for Reproductive Medicine, American College of Legal Medicine and Illinois State Medical Society

BEST AVAILABLE COPY

35 pp

QUESTION ADDRESSED BY *AMICI CURIAE*

Whether the property of medical professionals, including the right to conduct their business free from coercive force and threats, is property for purposes of the Hobbs Act, 18 U.S.C.S. § 1951?

TABLE OF CONTENTS

	Page
INTRODUCTION	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
Petitioners' Criminal Conduct Falls Under The Hobbs Act Because It Targets The Property Of Medical Clinics And Medical Practitioners – Namely, Their Right To Conduct Business Undeterred By Violence And Threats Of Violence	8
A. American Jurisprudence Traditionally Defines Property To Include Intangible Rights, Such As The Right To Conduct A Business Or To Practice A Profession	10
B. In Keeping With Our Jurisprudential Tradition And This Court's Teachings On The Common Law Roots Of Criminal Law, Federal Courts Have Applied Hobbs Act Protection To Intangible Property, Including The Right To Conduct A Business And To Practice Medicine Free From Coercive Threats And Force	15
C. Petitioners' Arguments Are Meritless	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Beauchamp v. De Abadia, 779 F.2d 773 (1st Cir. 1985) 13

Board of Regents v. Roth, 408 U.S. 564 (1972) 12

Carpenter v. United States, 484 U.S. 19 (1987) 16

Dent v. West Va., 129 U.S. 114 (1889) 12, 15

Dickman v. Commissioner, 465 U.S. 330 (1984) 11

Dolan v. City of Tigard, 512 U.S. 374 (1994) 12

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) 12

Evans v. United States, 504 U.S. 255 (1992) ..... *passim*

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 12

Keney v. Derbyshire, 718 F.2d 352 (10th Cir. 1983) 13

Kudish v. Bradley, 698 F.2d 59 (1st Cir. 1983) 13

Lowe v. Scott, 959 F.2d 323 (1st Cir. 1992) 13

Morissette v. United States, 342 U.S. 246 (1952) 16

National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 8

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989) 19, 20

Perry v. Sindermann, 408 U.S. 593 (1972) 13

Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 11

Sailors' Union of the Pacific v. Hammond Lumber Co., 156 F. 450 (9th Cir. 1907) 13

TABLE OF AUTHORITIES – Continued

Page

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 13

Stirone v. United States, 361 U.S. 212 (1960) 18

Taylor v. United States, 495 U.S. 575 (1990) 15

Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) 20, 21

United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) 20

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) 19

United States v. Bellomo, 176 F.3d 580 (2d Cir. 1999) 19

United States v. Clemente, 640 F.2d 1069 (2d Cir. 1981) 21

United States v. Craft, 122 S. Ct. 1414 (2002) 11

United States v. Croft, 750 F.2d 1354 (7th Cir. 1984) 17

United States v. Culbert, 435 U.S. 371 (1978) 18

United States v. Debs, 949 F.2d 199 (6th Cir. 1991) 19

United States v. Girard, 601 F.2d 69 (2d Cir. 1979) 16

United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) 16

United States v. Green, 350 U.S. 415 (1959) 21

United States v. Hoelker, 765 F.2d 1422 (9th Cir. 1985) 18

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986) 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Local 560, 780 F.2d 267 (3d Cir. 1985) 19

United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973) 18

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978) 18

United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986) 16

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 9, 18

United States v. Valenzeno, 123 F.3d 365 (3d Cir. 1997) 22

United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980) 9, 18

Watts v. Burkhart, 854 F.2d 839 (6th Cir. 1988) 13

Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) 13

STATE CASES

Appeal of Dell, 668 A.2d 1024 (N.H. 1995) 13

Billings Associated Plumbing, Heating and Cooling Contractors v. State Board of Plumbers, 602 P.2d 597 (Mont. 1979) 13

Boedy v. Dep't of Professional Regulation, 463 So. 2d 215 (Fla. 1985) 14

Ellis v. Journeyman Barbers' Int'l Union, 191 N.W. 111 (Iowa 1922) 13

TABLE OF AUTHORITIES – Continued

Page

Hake v. Arkansas State Med. Bd., 374 S.W.2d 173 (Ark. 1964).....14

Hughes v. Board of Architectural Examiners, 952 P.2d 641 (Cal. 1998).....13

Lyness v. Commonwealth, State Bd. of Medicine, 605 A.2d 1204 (Pa. 1992).....14

Minton v. Board of Med. Examiners, 881 P.2d 1339 (Nev. 1994).....13

Osceola v. Blair, 2 N.W.2d 83 (Iowa 1942).....13

People v. Barondess, 31 N.E. 240 (N.Y. 1892).....17

People v. Hughes, 32 N.E. 1105 (N.Y. 1893).....17

People v. Weinseimer, 102 N.Y.S. 579, *aff'd*, 190 N.Y. 537 (1907).....17

Pet v. Dep't of Health Servs., 638 A.2d 6 (Conn. 1994).....13

State Bd. of Medical Examiners v. Friedman, 263 S.W. 75 (Tenn. 1924).....14

State ex rel. Sbordy v. Rowlett, 190 So. 59 (Fla. 1939).....14

Suckow v. Alderson, 187 P. 965 (Cal. 1920).....14

Texarkana v. Brachfield, 183 S.W.2d 304 (Ark. 1944).....13

Volpicelli v. Jared Sydney Torrance Memorial Hosp., 109 Cal. App. 3d 242 (Ct. App. 1980).....14

Yeargin v. Hamilton Memorial Hosp., 171 S.E.2d 136 (Ga. 1969).....14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C.S. § 1954.....17

18 U.S.C.S. § 201.....16

18 U.S.C.S. § 641.....16, 17

Hobbs Act, 18 U.S.C. § 1951.....6, 8

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.....3, 6, 8

MISCELLANEOUS

A.M. Honore, "Ownership," *Oxford Essays in Jurisprudence: A Collective Work*, (ed.) by A. G. Guest (Oxford University Press, 1961).....11

Benjamin Cardozo, *Paradoxes of Legal Science* 129 (1928) (reprint 2000).....11

Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (November 1913).....11

Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710 (June 1917).....11

John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (1888).....11

James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988).....22

James Madison, *Property*, VI *The Writings of James Madison* 102 (1792) (G. Hunt ed. 1906).....11

TABLE OF AUTHORITIES – Continued

Page

Note, *Federal Statutes – Racketeer Influenced and Corrupt Organizations Act – Seventh Circuit Upholds Injunction Against Anti-Abortion Protest Leaders*, 115 Harv. L. Rev. 1745 (2002) 6

Charles Reich, *The New Property*, 73 Yale L. J. 733 (1964) 10

The Records of the Federal Convention of 1787 302 (M. Farrand ed. 1911) 10

Jeremy Waldron, *The Right to Private Property* (1988) 10

INTEREST OF *AMICI CURIAE*

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. Founded in 1847, its purpose is to promote the science and art of medicine and to improve public health. The AMA's 275,000 members include practitioners in all areas of medicine, medical research, and medical education throughout the United States.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, non-profit organization of physicians who specialize in obstetric and gynecological care. ACOG is the leading group of professionals providing health care to women. ACOG has over 43,000 members, representing approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

Amicus California Medical Association ("CMA") is a private, voluntary, non-profit organization of physicians dedicated to the health of Californians. Founded in 1856, the CMA, with over 34,000 members, is the largest state medical association in the country.

Amicus American Society for Reproductive Medicine ("ASRM") is a private, voluntary, non-profit organization of physicians and other medical professionals specializing in reproductive issues and practices. The ASRM supports and sponsors educational activities for the lay public and continuing medical education activities for professionals who are engaged in the practice of, and research in, reproductive medicine.

---

* Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Amicus American College of Legal Medicine ("ALCM") is a private, voluntary, non-profit organization of physicians, attorneys, dentists, health care professionals, administrators, scientists, and others with a sustained interest in medical legal affairs. The ACLM promotes interdisciplinary cooperation of issues involving law and medicine.

Amicus Illinois State Medical Society ("ISMS") is a private, voluntary, non-profit organization of physicians of all practice types. Established in 1840, the ISMS represents the interests of member physicians, advocates for patients and promotes the doctor/patient relationship, the ethical practice of medicine, and the betterment of the public health within the state of Illinois.

Amici support patients' right of access to medical care. They oppose violence and all acts of intimidation directed against physicians and other health care providers and their families. They further oppose violence directed against medical facilities, including abortion clinics and family planning centers, as an infringement of individuals' right of access to the services of such centers.

AMA, ACOG, CMA, ASRM, ACLM and ISMS respectfully submit this brief as *amici curiae* in support of respondents.[1] All parties have consented in advance to the filing of amicus briefs by any and all interested parties in this case. *See* Supreme Court Rule 37.3(a).

[1] The AMA, the CMA, and the ISMS appear herein on their own behalf as corporate entities and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the State Medical Societies, intended to present the viewpoint of organized medicine in the courts.

INTRODUCTION

The petitioners in this case are individuals and organizations that systematically employ criminal tactics to hinder or prevent medical practitioners from carrying on their professional work. These illegal activities are illustrative of a larger, disturbing pattern of violence against medical practitioners, medical researchers and medical facilities across the nation. This case involves a frequent target of such violent attacks – clinics that perform abortions or provide reproductive counseling. *Amici* believe that abortion is a matter of personal values and beliefs, and an appropriate topic for vigorous public debate. But criminal attacks on clinics and physicians, which include actual and attempted murders, kidnappings, bombings, arsons and extortion, go far beyond the realm of debate or protected speech. Indeed, there is no question in this case that petitioners engaged in unlawful activity; the only question here is whether that unlawful conduct gives rise to civil liability under the Hobbs Act and the Racketeer Influenced and Corru[illegible]rganizations Act ("RICO").

The threat faced by the medical community is by no means limited to the abortion context. Numerous organizations crusading for such causes as animal rights, environmentalism and opposition to biotechnology regularly plan and execute violent attacks on medical practice and research facilities. In recent years, vigilantes have firebombed medical laboratories and health clinics; they have threatened and injured individual physicians, nurses and researchers; and they have released and injured laboratory animals, destroyed scientific studies, and, in some cases, set research back by years. The record of violence is staggering. For example:

- In January 2002, the Earth Liberation Front ("ELF"), an environmental group, set fire to the construction site of the Microbial and Plant Genomic Research Center at the University of Minnesota. Minneapolis Star Tribune, April 7, 2002.

- On August 21, 2001, ELF claimed credit for vandalizing a cancer research lab in Cold Spring Harbor, New York, which ELF mistakenly believed was engaged in genetic research. *See* National Animal Interest Alliance archive of terrorist acts by animal rights and environmental groups ("NAIA online archive"), http://www.naiaonline.org/body/articles/archives/arterror.html.

- On June 10, 2001, anti-bioengineering protesters attacked the biotechnology building at the University of Idaho in Boise. NAIA online archive.

- On May 21, 2001, ELF activists firebombed the University of Washington's Center for Urban Horticulture in Seattle, gutting offices and laboratories, destroying over 20 years of research, and causing an estimated $5.4 million in damage. *Id.*

In addition, animal rights activists have targeted medical facilities that use animals to conduct research. For example, the Animal Liberation Front ("ALF") claimed responsibility for firebombing a primate research lab in New Mexico in September 2001, causing $1 million in losses to tools, equipment and records. Boston Globe, Dec. 6, 2001. Animal rights activists also attacked the Cornell University Duck laboratory, releasing over 250 ducks that were part of a research study, NAIA online

archive; destroyed a 72-year-old medical research project at the College of Notre Dame, *id.*; sent packages booby-trapped with razor blades to primate research facilities nationwide, *id.*; vandalized an animal facility at Western Washington University, stealing animals and dumping muriatic acid in medical researchers' offices, http://www.fbresearch.org/illegal-body.html; and raided laboratories at the University of Minnesota, releasing animals used in Alzheimer's and cancer research, NAIA online archive, and causing damage estimated at over $2 million, http://www.fbresearch.org/illegal-body.html.

The tragic costs of this criminal conduct include, of course, the pecuniary and personal losses suffered by the immediate victims. In addition, however, these crimes exact a serious toll on the progress of medicine in this country and the consequent well-being of our citizens. To take just one example, federal law requires that certain drugs be tested on animals before human studies can begin. When activists interfere with animal studies by means of unlawful threats and violence, they hinder the development of medicines and treatments that will ameliorate or cure serious medical conditions, bring relief from pain, and save countless lives.

Amici and their members have a vital interest in ensuring that physicians and medical researchers, and the facilities in which they practice medicine and conduct research, receive effective legal protection from the disruptions and injuries that follow from such criminal conduct. This interest encompasses the protection not only of the lives and livelihoods of physicians and researchers, but also of the health and safety of patients and the substantial public interest in the advancement of medical science.

This case demonstrates the enormous challenge faced by this nation, namely, to punish and deter organizations that seek to impose their particular vision of morality on society as a whole by engaging in an orchestrated, interstate campaign of violence against medical practitioners, researchers and facilities. No single solution serves to answer this challenge. While the 1994 Freedom of Access to Clinic Entrances Act ("FACE") helps protect abortion clinics and their patients, it does not begin to address the full range of problems at issue here. For one thing, FACE punishes individual wrongdoers only; it does not reach the leaders who dispatch foot soldiers across state lines or exploit the channels of interstate commerce to wage "war" against reproductive health service providers. *See* Note, *Federal Statutes – Racketeer Influenced and Corrupt Organizations Act – Seventh Circuit Upholds Injunction Against Anti-Abortion Protest Leaders*, 115 Harv. L. Rev. 1745 (2002). Further, FACE is confined to the abortion and reproductive counseling setting, and does not apply to violence against any other type of medical facility. By enjoining the activities of protest leaders bent on achieving their ends through destruction and intimidation, RICO and the Hobbs Act together provide an essential remedy against the violence that threatens both the medical profession and the community it serves.

SUMMARY OF ARGUMENT

The Hobbs Act defines extortion, in pertinent part, as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C.S § 1951(b)(2). Petitioners argue the Hobbs Act applies only to tangible property that

can be physically confiscated, and not to the property at issue here, *i.e.*, the right to carry out a business, practice a profession or realize the benefits of a contract free from threats and violence.

It is well-established, however, that the Hobbs Act protects just such rights, in keeping with its broad purpose and its common law antecedents. As this Court has repeatedly held, a statutory term is generally presumed to have its common law meaning. Petitioners cite no evidence that Congress intended the word "property" in the Hobbs Act to be understood in a narrow sense, at odds with common law, which understands "property" as a "bundle of rights," including intangible rights like the right to conduct a lawful business or to practice a profession free from threats or coercion.

Petitioners' crabbed reading of "property" in the Hobbs Act to include only tangible, physically grasp-able property leads to the insupportable conclusion that a person who takes a scalpel out of a doctor's hand to prevent him or her from continuing an operation is guilty of extortion, while a person who hurls a firebomb or assaults patients to shut down the doctor's business is not. That is not, and cannot be, the law.

ARGUMENT

PETITIONERS' CRIMINAL CONDUCT FALLS UNDER THE HOBBS ACT BECAUSE IT TARGETS THE PROPERTY OF MEDICAL CLINICS AND MEDICAL PRACTITIONERS – NAMELY, THEIR RIGHT TO CONDUCT BUSINESS UNDETERRED BY VIOLENCE AND THREATS OF VIOLENCE.

The Hobbs Act, 18 U.S.C. § 1951, defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." Among other arguments, petitioners claim that the Seventh Circuit erred in holding that the definition of "property" for the purpose of Hobbs Act liability includes "[(1)] the class women's rights to seek medical services from the clinics, [(2)] the clinic doctors' rights to perform their jobs, and [(3)] the clinics' rights to provide medical services and otherwise conduct their businesses." *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). According to petitioners, the Seventh Circuit's definition is overbroad because the Hobbs Act applies only to tangible property that can be physically confiscated.[2]

Petitioners are wrong – and, as especially relevant to *amici* here, wrong in a way that slights the rights of doctors and their practice groups to pursue their professions and businesses. Doctors perform many services. Among other things, they assess and treat patients for

[2] Although *amici* medical associations focus on the property rights of doctors and clinics, they endorse respondents' arguments regarding the rights of patients. *Amici* also do not address the RICO issue, but similarly endorse respondents' arguments regarding the scope of RICO.

medical conditions during scheduled office visits, provide counseling in disease prevention, offer emergency care to victims of accidents and sudden illness, perform surgery, and prescribe drugs. They also conduct research that enables society to acquire a better understanding of the human organism and the things that threaten it, to determine the factors that trigger disease, and to develop new medicines for treating disease.

Although the Seventh Circuit did not elaborate on the definition of property under the Hobbs Act, its holding that the statute extends to the rights of doctors and clinics to carry on their business is undoubtedly correct. Indeed, it is consistent with the decision of every other Circuit Court of Appeals to consider this issue. It is also consistent with the broad purpose of the Hobbs Act, which, in keeping with a venerable common law tradition, includes the property rights of business owners to conduct their business and professionals to do the work they are licensed to do.

Petitioners do not dispute that gangsters are guilty of extorting property under the Hobbs Act when they assault others and destroy their businesses to get them to stop cooperating with law enforcement. *United States v. Zemek*, 634 F.2d 1159, 1168, 1174 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (defendants firebombed taverns and topless dancing establishments to discourage cooperation with law enforcement officials, obtaining control over victims' goodwill and customer revenues). Nor do they dispute that a company seeking to oust its competitor by means of violence is guilty of extorting property under the Hobbs Act. *United States v. Tropiano*, 418 F.2d 1069, 1072-73, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970)

(defendant threatened competitor garbage collection company to prevent it from soliciting further business; property extorted was victim's right to conduct his business and solicit customers). If the Hobbs Act protects the property of tavern owners and garbage collection companies from criminals who threaten or attack them or their establishments to gain unlawful advantages, surely it must protect the business practices of doctors and medical researchers (whose work is recognized as essential to the well-being of the community) from those who stoop to crime to carry out their social agenda.

A. American Jurisprudence Traditionally Defines Property To Include Intangible Rights, Such As The Right To Conduct A Business Or To Practice A Profession.

This country was founded on the idea that, as Alexander Hamilton put it, "[o]ne great ob[ject] of Gov[ernment] is personal protection and the security of Property." *The Records of the Federal Convention of 1787* 302 (M. Farrand ed. 1911). While the precise contours of "property" are far from clear, the one thing that unquestionably emerges from over two centuries of jurisprudential commentary is that property extends far beyond the realm of physical objects to include intangible "things of value" as well as a vast array of rights in relation to tangible and intangible things.[3]

[3] *See, e.g.*, Charles Reich, *The New Property*, 73 Yale L. J. 733 (1964); Jeremy Waldron, *The Right to Private Property* (1988).

James Madison wrote that the government's duty to protect property includes a duty to protect its citizens' "free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called." James Madison, Property, in VI *The Writings of James Madison* 102 (1792) (G. Hunt ed. 1906). And, long before the writings of Wesley Hohfeld and A. M. Honore popularized the notion that property is a bundle of rights,[4] a legal scholar commented that, "the dullest individual among the people knows and understands that his property in anything is a bundle of rights." John Lewis, A Treatise on the Law of Eminent Domain in the United States § 55, at 43 (1888) (emphasis omitted).

Time and again, this Court has applied these core tenets. For instance, this Court routinely employs the "common idiom [that] describes property as a 'bundle of sticks' – a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 122 S. Ct. 1414, 1420 (2002) (citing B. Cardozo, *Paradoxes of Legal Science* 129 (1928) (reprint 2000) and *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984)); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 169-70 (1998) ("property is more than economic value [citation]; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as

[4] *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (November 1913); idem, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710 (June 1917); A. M. Honore, "Ownership," *Oxford Essays in Jurisprudence: A Collective Work*, (ed.) by A. G. Guest (Oxford University Press, 1961).

the right to possess, use and dispose of it' "); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("The right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property' ") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

More to the point, this Court has repeatedly confirmed that this "bundle" or group of rights includes the right to conduct a lawful business. As this Court stated well over a century ago:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose. . . . The interest, or, as it is some times termed, the "estate," acquired in them – that is, the right to continue their prosecution – is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

Dent v. West Va., 129 U.S. 114, 121-22 (1889); *see Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921) (the "business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference"); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (recognizing property right in continued employment, where employee has "a legitimate claim of entitlement to it. . . . [based on] rules or understandings that secure certain benefits and

that support claims of entitlement to those benefits."); *accord*, *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).[5]

Also included in the bundle of rights is the right to practice a profession, once that right has vested. One of the ways in which a right to practice a profession vests and becomes a protected property interest is through state licensing laws, *e.g.*, laws regulating medical licenses. *E.g.*, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (holding that a professional's license is a protected property interest); *Hughes v. Board of Architectural Examiners*, 952 P.2d 641, 657-58 (Cal. 1998) ("an individual, having obtained the license required to engage in a particular profession or vocation, has a 'fundamental vested right' to continue in that activity.") (citations omitted).[6] State regulation of doctors creates a property

---

[5] The lower federal and state courts have long followed suit. *E.g.*, *Sailors' Union of the Pacific v. Hammond Lumber Co.*, 156 F. 450, 454 (9th Cir. 1907) (owner of a shipping business has a property right in the business beyond the value of the shipping vessels themselves); *Billings Associated Plumbing, Heating and Cooling Contractors v. State Board of Plumbers*, 602 P.2d 597, 600 (Mont. 1979) (right to carry on plumbing business is a property right); *Texarkana v. Brachfield*, 183 S.W.2d 304, 308 (Ark. 1944) (right to operate a licensed hotel); *Osceola v. Blair*, 2 N.W.2d 83, 83-84 (Iowa 1942) (right to conduct door-to-door sales); *Ellis v. Journeyman Barbers' Int'l Union*, 191 N.W. 111, 115 (Iowa 1922) (right to run a barbershop).

[6] The cases holding that physicians enjoy a protected property interest in a license to practice medicine are legion. *E.g.*, *Lowe v. Scott*, 959 F.2d 323, 334-35 (1st Cir. 1992); *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985); *Kudish v. Bradley*, 698 F.2d 59 (1st Cir. 1983); *Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir. 1988); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983); *Pet v. Dep't of Health Servs.*, 638 A.2d 6, 24 (Conn. 1994); *Appeal of Dell*, 668 A.2d 1024, 1031 (N.H. 1995); *Minton v. Board of Med. Examiners*, 881 P.2d 1339, 1354 (Nev. 1994);

(Continued on following page)

interest whose value is proportionate to the degree of importance placed upon the practice of medicine.

It is worth recalling the words of this Court in a medical licensing case from over a hundred years ago:

> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society

Lyness v. Commonwealth, State Bd. of Medicine, 605 A.2d 1204, 1207 (Pa. 1992); *Boedy v. Dep't of Professional Regulation*, 463 So. 2d 215, 217 (Fla. 1985); *Hake v. Arkansas State Med. Bd.*, 374 S.W.2d 173, 175 (Ark. 1964); *State ex rel. Sbordy v. Rowlett*, 190 So. 59 (Fla. 1939); *State Bd. of Medical Examiners v. Friedman*, 263 S.W. 75 (Tenn. 1924); *Suckow v. Alderson*, 187 P. 965, 966 (Cal. 1920) (all holding that physicians enjoy a protected property interest in a license to practice medicine); *see Volpicelli v. Jared Sydney Torrance Memorial Hosp.*, 109 Cal.App.3d 242, 249 (1980) (holding hospitals may not terminate a doctor's staff privileges without first affording him or her procedural due process); *accord, Yeargin v. Hamilton Memorial Hospital*, 171 S.E.2d 136, 139 (Ga. 1969), *cert. denied*, 397 U.S. (1970).

> may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.

Dent v. West Va., 129 U.S. at 122-23.

B. In Keeping With Our Jurisprudential Tradition And This Court's Teachings On The Common Law Roots Of Criminal Law, Federal Courts Have Consistently Applied Hobbs Act Protection To Intangible Property, Including The Right To Conduct A Business And To Practice Medicine Free From Coercive Threats And Force.

This Court has repeatedly held that "'a statutory term is generally presumed to have its common-law meaning.'" *Evans v. United States*, 504 U.S. 255, 259-60 (1992) (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)). Indeed, it has followed that cardinal rule in Hobbs Act cases. For example, in *Evans*, this Court's most recent Hobbs Act decision, it stated: "'Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was

taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such cases, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see id.* at n.3 ("as Justice Frankfurter advised, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"); *id.* at 277 ("the language at issue here must be interpreted in light of the familiar principle that absent any indication otherwise, Congress meant its words to be interpreted in light of the common law") (Kennedy, J., concurring). In short, the Hobbs Act's use of the word "property" must be be read in accordance with the traditional common law understanding of property as a bundle of rights that includes intangible property.

Petitioners cite no evidence that Congress intended the word "property" in the Hobbs Act to be understood in a narrow sense, at odds with its common law meaning. In fact, extortion is no different than any of the numerous Title 18 offenses using the term "property" or "thing of value," which courts have regularly applied to offenses involving intangible property. [7]

[7] *E.g., Carpenter v. United States*, 484 U.S. 19, 25 (1987) (confidential business information is "property" for purposes of the mail and wire fraud statutes); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (law enforcement information is a "thing of value" under the stolen property statute, 18 U.S.C.S. § 641); *United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (loans and promises of future employment are "things of value" under the bribery statute, 18 U.S.C.S. § 201); *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir. 1986) (assistance

(Continued on following page)

As respondents and the United States explain in their briefs, the New York statutes on which the Hobbs Act was based – and on which petitioners mistakenly place much stock – did not limit or alter the common law meaning of "property." Indeed, courts applying New York's extortion laws relied from the start on the common law meaning of property in applying the laws to the intangible rights of business owners. *E.g., People v. Barondess*, 31 N.E. 240, 241 (N.Y. 1892); *People v. Hughes*, 32 N.E. 1105 (N.Y. 1893); *People v. Weinseimer*, 102 N.Y.S. 579, 614 (App. Div.) ("an injury to one's business is an injury to property"), *aff'd*, 190 N.Y. 537 (1907).

Moreover, it is plain that Congress intended to *broaden* the common law scope of extortion by extending it to cover unlawful acts of coercion by ordinary citizens, and not just public officials, to whom the offense was limited at common law. *Evans*, 504 U.S. at 260; *see id.* at 261 ("Congress . . . unquestionably *expanded* the common-law definition of extortion" when it enacted the Hobbs Act) (original emphasis); *id.* at 263 (purpose of Hobbs Act is "'to protect the right of citizens of this country to market their products without any interference from lawless bandits'") (quoting 91 Cong. Rec. 11910, 11912 (1945)).

Finally, this Court has observed that the Hobbs Act is "broad [in] scope," and "'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate

in arranging a union merger is a "thing of value" under 18 U.S.C.S. § 1954); *United States v. Croft*, 750 F.2d 1354, 1361-62 (7th Cir. 1984) (the labor of a government employee constitutes a "thing of value" under 18 U.S.C.S. § 641).

commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree."'" *Evans v. United States*, 504 U.S. 255, 264 n.12 (1992) (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)); *see United States v. Culbert*, 435 U.S. 371, 380 (1978) (holding that Congress intended the Hobbs Act should fully reach criminal conduct enumerated in the statute).

In keeping with the common law understanding of property and the Hobbs Act's broad purpose, federal courts have uniformly applied Hobbs Act protection to intangible rights such as the right to conduct a lawful business,[8] to make business and financial decisions free from threats or coercion,[9] and to vote in union elections.[10]

---

[8] *E.g.*, *United States v. Zemek*, 634 F.2d 1159, 1168, 1174 (9th Cir. 1980) *cert. denied*, 450 U.S. 916 (1981) (defendants committed extortion by assaulting competitors and firebombing their taverns and topless dancing establishments in order to discourage cooperation with law enforcement officials; property obtained was goodwill and customer revenues); *United States v. Nadaline*, 471 F.2d 340, 342-44 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973) (defendant assaulted and threatened competitor to induce him to fire sales representative formerly employed by defendant; property extorted was victim's business accounts and unrealized profits); *United States v. Tropiano*, 418 F.2d 1069, 1072-73, 1075 (2d Cir. 1969) *cert. denied*, 397 U.S. 1021 (1970) (defendant threatened competitor garbage collection company to prevent it from soliciting further business; property extorted was victim's right to conduct his business and solicit customers).

[9] *E.g.*, *United States v. Hoelker*, 765 F.2d 1422, 1424-25 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986) (defendant threatened victim with physical violence to get him to sign a life insurance policy naming defendant as beneficiary; property extorted was victim's "right to make personal and business decisions about the purchase of life insurance"); *United States v. Santoni*, 585 F.2d 667, 670, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (defendant pressured painting company

(Continued on following page)

It is hardly surprising, then, that, like the Seventh Circuit in this case, federal courts have applied the Hobbs Act to protect the rights of medical professionals to conduct their work free from violence and threats. For example, in *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000), the Second Circuit held that defendants committed extortion by pouring butyric acid in a medical clinic that provided a variety of reproductive health services, including abortion, for the purpose of closing down the clinic and preventing patients from using the clinic. *Id.* at 385-86, 392-94. The property extorted was "the business of rendering reproductive health care services engaged in by [the clinic] and [the doctor whose offices were targeted]." *Id.* at 392.

Similarly, in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the Third Circuit held that defendant anti-abortion activists violated the Hobbs Act by harassing a clinic's clients and employees and damaging and destroying medical equipment. *Id.* at 1347, 1349-50. Defendants extorted "the [clinic's] . . . property interest in continuing to provide abortion services"; the clinic employees' "property

---

into signing subcontract with cleaning company; property extorted was victim's right "to make a business decision free from outside pressure wrongfully imposed").

[10] *E.g.*, *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir.), *cert. denied*, 528 U.S. 987 (1999) (defendants threatened union members with violence to induce them to vote for defendants' candidate for union office; property extorted was right of union members to democratic participation in union); *accord, United States v. Debs*, 949 F.2d 199, 200-201 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992); *United States v. Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

interest in continuing their employment with the [clinic]"; and the patients' "property interest in entering into a contractual relationship with the [clinic and its staff]." *Id.* at 1350; *see also United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant anti-abortion activist violated the Hobbs Act by abducting a doctor and his wife and threatening to kill them unless the doctor promised to shut down his clinic and stop performing abortions).

C. Petitioners' Arguments Are Meritless.

The Scheidler petitioners sidestep the property rights of clinics and doctors by focusing their argument on the rights of women patients. (Scheidler brief at 11-17, 33-34.)[11] They brush off the rights of clinics and doctors with an aside, noting in passing that, "just as with the extortion claims of patients, the jury was not required to find that petitioners had actually 'obtained' [the] interests [of clinics or doctors]." (Scheidler brief at 17.) Later in their brief, the Scheidler petitioners acknowledge that the Hobbs Act protects intangible property that is "considered as a source or element of wealth." (Scheidler petitioners' brief at 33-34, quoting *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101-02 (2d Cir. 1990)). Petitioners remark in a footnote, however, that "[i]t is not clear that the clinics' right to offer services . . . would qualify as property even under the broader reach of the mail fraud statute." (Scheidler brief at 34, n.27.) Petitioners do not explain why

[11] *Amici* endorse respondents' argument that petitioners extorted patients' property rights by preventing them from keeping medical appointments or undergoing medical services for which they had expressly contracted.

this is "not clear" – under the very case they cite, *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, and the numerous cases cited in this brief, it is perfectly clear that the Hobbs Act covers such intangible rights, including "the right to solicit business." *Id.* at 101.

Both sets of petitioners argue that Hobbs Act protection must be limited to tangible or intellectual property because only such property can be "*obtained*." (Scheidler brief at 11-12, 14-18, 27-32; Operation Rescue brief at 33-39.) That argument is untenable. Petitioners unquestionably "obtain" the property of their victims by wresting control over their victims' property rights. As this Court has held, "extortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956).[12]

Petitioners attempt to strengthen their argument by insisting that property must be understood in a limited sense to distinguish the offense of extortion (which they claim involves only tangible or intellectual property) from

[12] *Accord, United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) ("To secure a conviction under the Hobbs Act, the prosecution does not have to show that the defendant acted to receive, either directly or indirectly, the proceeds of his extortion or any benefit therefrom. . . . The extortionist, therefore, does not have to intend to receive the funds demanded. Thus, the defendant would have violated § 1951 if, for example, he had simply demanded that [the victim] burn $1 million in cash.") (citations omitted), *cert. denied*, 479 U.S. 1093 (1987); *United States v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir.) ("whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act"), *cert. denied*, 454 U.S. 820 (1981). (*See also* respondent's brief; U.S. brief at 21-26.)

the offense of coercion (which they claim protects "liberty" rights). (Scheidler brief at 23-24, 27-32; Operation Rescue brief at 35, 37-39). This argument also fails. As this Court recognized in *Evans*, extortion by private individuals *is a form of coercion*. 504 U.S. at 263 (distinguishing between extortion by official right and "coercive extortion" by private individuals).[13] The overlap between extortion and coercion is reflected in the dictionary meaning:

> *Extort*: to compel or *coerce* . . . by any means serving to overcome one's power of resistance; to gain by wrongful methods; to obtain in an unlawful manner; to exact something wrongfully by threats or putting in fear.

United States v. Valenzeno, 123 F.3d 365, 369 n.4 (3d Cir. 1997) (quoting Black's Law Dictionary (6th ed.)) (emphasis in opinion). It is also reflected in the history of the offense. *See, e.g.*, James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 825 (1988) (cited in *Evans*, 504 U.S. at 261 and *passim*). This Court should reject petitioners' effort to limit the meaning of the word "property" in the Hobbs Act in reliance on an artificial distinction between two related offenses.

A simple illustration reveals the absurdity of petitioners' crabbed reading of "property" in the Hobbs Act to

[13] Indeed, extortion under color of official right coincides with bribery just as extortion by private individuals coincides with coercion. *Id.* at 267. The overlap between these related criminal offenses is inevitable, and, as this Court observed, "it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery." *Id.* at 268. No more is it a defense to extortion by force or fear that the defendant could have been convicted of coercion.

include only tangible, physically grasp-able property. If petitioners were right, then a person who took a scalpel out of a doctor's hand to prevent him or her from continuing an operation would be guilty of extortion, while a person who hurled a firebomb or assaulted patients to shut down the doctor's business would not. That cannot be the law. The Hobbs Act was designed to protect the business of citizens from interference by "lawless bandits" seeking to carry out a private agenda. *Evans*, 504 U.S. at 263. It should certainly protect the rights of medical professionals to do their work free from violent and destructive interference by groups who would force them to abandon their research or their patients.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
WILLIAM A. NORRIS – *Counsel of Record*
EDWARD P. LAZARUS
MICHAEL C. SMALL
L. RACHEL HELYAR
SANDRA M. LEE
Attorneys for Amici Curiae American Medical Association, American College of Obstetricians and Gynecologists, California Medical Association, American Society for Reproductive Medicine, American College of Legal Medicine and Illinois State Medical Society

Dated: September 17, 2002

AMERICAN MEDICAL ASSOCIATION

H-5.989 Freedom of Communication Between Physicians and Patients

---

It is the policy of the AMA: (1) to strongly condemn any interference by the government or other third parties that causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient;

(2) working with other organizations as appropriate, to vigorously pursue legislative relief from regulations or statutes that prevent physicians from freely discussing with or providing information to patients about medical care and procedures or which interfere with the physician-patient relationship;

(3) To communicate to HHS its continued opposition to any regulation that proposes restrictions on physician-patient communications; and

(4) to inform the American public as to the dangers inherent in regulations or statutes restricting communication between physicians and their patients. (Sub. Res. 213, A-91; Reaffirmed: Sub. Res. 232 I-91, Reaffirmed by Rules & Credentials Cmt., A-96, Reaffirmed by Sub. Res. 133 and BOT Rep. 26, A-97; Reaffirmed by Sub. Res. 203 and 707, A-98. Reaffirmed: Res. 703, A-00)

H-5.990 Policy on Abortion

The issue of support of or opposition to abortion is a matter for members of the AMA to decide individually, based on personal values or beliefs. The AMA will take no action which may be construed as an attempt to alter or influence the personal views of individual physicians regarding abortion procedures. (Res. 158, A-90; Reaffirmed by Sub. Res. 208, 196; Reaffirmed by BOT Rep. 26, A-97)

H-5.993 Right to Privacy in Termination of Pregnancy

The AMA reaffirms existing policy that (1) abortion is a medical procedure and should be performed only by a duly licensed physician in conformance with standards of good medical practice and the laws of the state; and (2) no physician or other professional personnel shall be required to perform an act violative of good medical judgment or personally held moral principles. In these circumstances good medical practice requires only that the physician or other professional withdraw from the case so long as the withdrawal is consistent with good medical practice. The AMA further supports the position that the early termination of pregnancy is a medical matter between the patient and the physician, subject to the physician's clinical judgment, the patient's informed consent, and the availability of appropriate facilities. (Res. 49, I-89; Reaffirmed by Sub. Res. 208, I-96; Reaffirmed by BOT Rep. 26, A-97)

H-5.997 Violence Against Medical Facilities and Health Care Practitioners and Their Families

The AMA supports the right of access to medical care and opposes (1) violence and all acts of intimidation directed against physicians and other health care providers and their families and (2) violence directed against medical facilities, including abortion clinics and family planning centers, as an infringement of the individual's right of access to the services of such centers. (Res. 82-84; Reaffirmed by CLRPD Rep. 3-I-94; Res. 422, A-95; Reaffirmation I-99)